BRIDGING THE GAP BETWEEN CONSERVATION AND LAND REFORM

COMMUNALLY-CONSERVED AREAS AS A TOOL FOR MANAGING SOUTH AFRICA'S NATURAL COMMONS

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‘Thus, when any environmental issue is pursued to its origins, it reveals an inescapable truth – that the root cause of the crisis is not to be found in how [people] interact with nature, but in how they interact with each other - that to solve the environmental crisis we must solve the problems of poverty, racial injustice and war ...’

(Commoner B “Ecology and Social Action” in Albright H (ed)
The Horace M. Albright Conservation Lectureship,
(1973) 13 University of California 62)

DECLARATION

I, Alexander Ross Paterson, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University of Cape Town to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ALEXANDER PATERSON DATE

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NOTE ON REFERENCING

The style of referencing adopted in this thesis generally complies with the UCT Faculty of Law's *Research, Writing, Style and Referencing Guide*. The first occasion I refer to a source in each chapter, I provide its full reference. I thereafter utilise an abridged reference format.

Reference is made in Chapter 2 and Chapter 5 of this dissertation to certain works I have written and published during the course of researching and completing this dissertation. These are: Paterson A "Clearing or Clouding the Discourse: A South African Perspective on the Utility of the IUCN Protected Areas Governance Typology" (2010) 10(3) *South African Law Journal* 490-514; and Paterson A "Wandering About South Africa's New Protected Areas Regime" (2007) (1) *SA Public Law* 1-33 respectively. Material contained in this thesis that has been drawn from these articles is referenced accordingly.

ABSTRACT

This dissertation examines whether the concept of communally-conserved areas provides a useful tool for bridging the current apparent impasse between South Africa's conservation and land reform agendas. Part 1 of the dissertation begins by reflecting on the role of protected areas in conserving the natural commons. It considers the nature and form of the natural commons and the increasing recognition accorded to communal property regimes in regulating common pool resources. It similarly considers the nature and form of protected areas and recent attempts to distil a range of protected areas governance typologies to aid in their analysis and implementation. Having highlighted the inherent frailties of the contemporary protected areas governance typology, a new approach is advocated, one founded on the main elements influencing governance in protected areas, namely: land tenure; management; and beneficiation. Using this approach, the concept of communally-conserved areas is introduced and defined, effectively constituting protected areas which seek to conserve common pool resources through communal property regimes. The dissertation then considers the range of ideological shifts in the scholarship of economists, property rights theorists, human rights advocates, ecologists and conservationists that have raised the prominence accorded to this form of protected areas governance in the past two decades. This part of the dissertation concludes by considering the elements that theoretically underpin successful communally-conserved areas. Part 2 of the dissertation considers South Africa's current legal framework of relevance to communally-conserved areas. This legal framework, which is founded on South Africa's constitutional dispensation, sits somewhat uncomfortably between two legal domains, namely conservation and land reform. These domains, the institutions tasked with their administration and the policies and programmes which inform their implementation are considered in turn. So too are recent initiatives undertaken in the course of the past decade to bridge the apparent impasse between South Africa's conservation and land reform regimes in so far as they relate to the implementation of communally-conserved areas. Part 3 of the dissertation then critically assesses the manner in which this legal framework has been implemented during the course of the past two decades to balance domestic conservation and land reform agendas. This assessment is undertaken through the consideration of four case studies, namely: Richtersveld National Park; Pafuri Region of the Kruger National Park; Dwesa-Cwebe Nature Reserve; and the Eastern Shores Region of the Isimangaliso Wetland Park. Each of these case studies is assessed according to the essential elements identified in Part 2 which theoretically underlie successful communally-conserved areas. Part 4 of the dissertation concludes by drawing together the constituent parts of the dissertation and proposes an array of broad legislative reforms that appear necessary to provide for the more effective utilisation of communally-conserved areas in South Africa. In so doing, the dissertation seeks to provide a better understanding of the nature and value of communally-conserved areas as a tool for managing the natural commons. It aims to provide a lucid governance paradigm for protected areas that more accurately reflects their diverse nature. It identifies the core elements that underpin their successful implementation. It provides a critical analysis of South Africa's legal framework and the extent to which it contains an effective and equitable regime for implementing communally-conserved areas. Finally, through the consideration of an array of case studies, it distils several recommendations for domestic policy-makers tasked with revising and implementing South Africa's statutory framework of relevance to communally-conserved areas. Ultimately, it seeks to promote communally-conserved areas as an essential tool for managing South Africa's dwindling natural commons and bridging the divide between South Africa's land reform and conservation imperatives. This dissertation reflects the legal position as at 1 April 2011.

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LIST OF ABBREVIATIONS

Biodiversity Act	National Environmental Management: Biodiversity Act
CASS	Centre for Applied Social Studies
CCA	Communally-Conserved Area
CMC	Co-Management Committee
CDRP	Comprehensive Rural Development Programme
CEESP	Commission on Environment, Economic & Social Policy
COP	Conference of the Parties
CPA	Communal Property Association
CPI	Communal Property Institution
CRLR	Commission on the Restitution of Land Rights
DAFF	Department of Agriculture, Forestry & Fisheries
DCNR	Dwesa-Cwebe Nature Reserve
DCLT	Dwesa-Cwebe Land Trust
DEA	Department of Environmental Affairs
DEAET	Department of Economic Affairs, Environment & Tourism (Eastern Cape)
DEAT	Department of Environmental Affairs & Tourism
DRD&LR	Department of Rural Development & Land Reform
DWA	Department of Water Affairs
DWAF	Department of Water Affairs & Forestry
KNP	Kruger National Park
Kumleben Report	Report of the Board of Investigation into the Institutional Arrangements for Nature Conservation in South Africa
ICCA	Indigenous Community Conserved Area
ICCA Consortium	Indigenous and Community Conserved Area Consortium
IUCN	International Union for the Conservation of Nature

IUCN Management Guidelines (2008)	Guidelines for Applying Protected Areas Management Categories
IWP	Isimangaliso Wetland Park
JMB	Joint Management Board
LAC	Land Administration Committee
LARP	Land & Agrarian Reform Project
LCC	Land Claims Court
MCPA	Makuleke Communal Property Association
MEC	Provincial Member of Executive Council
MPC	Management Planning Committee
NGO	Non-Government Organisation
NBF	National Biodiversity Framework
NBSAP	National Biodiversity Strategy & Action Plan
NPB	National Parks Board
NPAES	National Protected Areas Expansion Strategy
NSBA	National Spatial Biodiversity Assessment
Protected Areas Act	National Environmental Management: Protected Areas Act
PLAAS	Institute for Poverty, Land & Agrarian Studies
PLAS	Proactive Land Acquisition Strategy
RCT	Richtersveld Community Trust
RNP	Richtersveld National Park
SANBI	South African National Biodiversity Institute
SANParks	South African National Parks
SIS Strategy	Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa
TL&GFA	Traditional Leadership and Governance Framework Act
UNEP	United Nations Environmental Law Programme
WCPA	World Commission on Protected Areas
White Paper on Biodiversity	White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity

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CHAPTER 1

INTRODUCTION

1. THE CONTEXT

As highlighted by Barry Commoner almost 40 years ago, the 'root cause' of many an environmental crisis is frequently found in the manner in which people 'interact with each other' – and that 'to solve the environmental crisis we must solve the problems of poverty, racial injustice and war'.[1] Nowhere are these sentiments more clearly depicted than in South Africa. Racial injustices underpinned by discriminatory land legislation, fractured communities, destroyed their relationship with their land, undermined traditional landownership and use patterns, deepened poverty and created yawning caverns between conservationists and disenfranchised local communities.

While having avoided the ravages of civil war, the country faces the ongoing challenge of simultaneously remedying the racial injustices of the past, alleviating widespread poverty, conserving the nation's rich yet rapidly dwindling natural resources and grappling with the ravages of climate change. In an effort to overcome these challenges, domestic policy-makers have introduced broad legal reforms in the land and conservation sectors. The agendas perpetuated by these legal reforms while theoretically reconcilable, frequently counteract one another in practice. The rudimentary question at the core of this dissertation is whether the notion of communally-conserved areas (CCAs),[2] provide a useful model for bridging the gap

[1] Commoner B "Ecology and Social Action" in Albright H (ed) *The Horace M. Albright Conservation Lectureship* (1973) 13 University of California, School of Forestry and Conservation 62.

[2] In this dissertation I distil and use the following definition of communally-conserved areas: 'a clearly defined geographical space, established, recognised, used and managed by indigenous peoples and local communities, themselves or in partnership with others, through legal or other effective means, to commonly achieve the enduring conservation of nature with associated ecosystem services and cultural values'. See further Chapter 3, which provides a detailed analysis of this definition and the nature, form and factors influencing communally-conserved areas.

between South Africa's conservation and land reform agendas; and if so, how to provide for their effective and equitable implementation.

Prior to addressing this question, it would appear prudent to provide the necessary context by briefly considering the following four issues. First, South Africa's current environmental social and economic realities. Second, the country's historic approach to conservation – characterised by protectionist attitudes, the physical displacement of communities and elitist tendencies. Thirdly, the reform of conservation management and land-holding patterns following the country's transition to a constitutional democracy in the mid-1990s. Finally, the country's current management and settlement patterns emanating from such reform.

1.1 ENVIRONMENTAL, SOCIAL AND ECONOMIC REALITIES

South Africa is fortunate currently to rank as the third most biologically diverse country in the world.[3] Although occupying less than 2 % of the world's land surface, it is home to nearly 10 % of the world's plant species and 7 % of the world's reptile, bird and mammal species.[4] The nation's rich biological diversity is, however, one of the most threatened on the planet[5] and in the most recent assessment of the nation's biological resources, 34 % of terrestrial ecosystems, 82 % of signature rivers and 65 % of marine bio-zones were classified as threatened.[6] In addition, 50 % of South Africa's wetlands have been

[3] Department of Environmental Affairs and Tourism *White Paper on the Conservation and Use of South Africa's Biodiversity* (1997) (published in GN 1095 *GG* No. 18163 dated 28 July 1997) 12. Of the 18 000 plant species found in South Africa, for example, 80 % occur nowhere else in the world. See further: World Conservation Monitoring Centre *Global Biodiversity Status of the Earth's Living Resources* (1992) Chapman & Hall London.

[4] Endangered Wildlife Trust *The Biodiversity of South Africa - Indicators, Trends and Global Impacts* (2002) Struik Cape Town.

[5] Wynberg R "A Decade of Biodiversity Conservation and Use in South Africa: Tracking Progress from Rio Earth Summit to the Johannesburg World Summit on Sustainable Development" (2002) 98 *SA Journal of Science* 233-243. The key sources of this threat are agricultural and forestry activities, the spread of alien invasive species, rapid urban expansion and genetic engineering.

[6] Driver A, Maze K, Rouget M, Lombard A, Nel J, Turpie J, Cowling R, Desmet P, Goodman P, Harris J, Jonas Z, Reyers B, Sink K & Strauss T *National Spatial Biodiversity Assessment 2004: Priorities for Biodiversity Conservation in South Africa* (2005) *Strelitzia* 17 South African National Biodiversity Institute, Pretoria *ix-xiiii*. See further: Department of Environmental Affairs and Tourism *South African Environmental Outlook: A Report on the State of the Environment* (2006) 108-137.

destroyed[7] and many species situated within and outside these ecosystems have been identified as vulnerable, endangered and critically endangered.[8] Recent assessments have indicated that approximately 10 % of South Africa's birds and frogs, and 20 % of its mammals are threatened.[9] The status of the country's plants is currently being re-assessed but according to previous assessments, 10 % of plant species are threatened with extinction.[10] Furthermore, 36 % of South Africa's freshwater fish are threatened.[11] These statistics are somewhat surprising if one considers that the Government has enacted, in the course of the past few decades, a complex network of laws to regulate the numerous threats posed to South Africa's biodiversity.[12]

South Africa's biological resources and ecosystems are clearly in a perilous state. So too, however, is the socio-economic plight facing the country's approximately 49.9 million[13] human inhabitants. Almost 35 % of these inhabitants earn less than US$2.5 a day[14] resulting in high infant mortality rates, low life expectancy, malnutrition and

[7] See generally: Kotze D, Breen C & Quinn N "Wetland Losses in South Africa" in Cowan G (ed) *Wetlands of South Africa* (1995) Department of Environmental Affairs and Tourism Pretoria.
[8] Department of Environmental Affairs and Tourism *South Africa's National Biodiversity Strategy and Action* Plan (2005) 14-16. See further: *National Spatial Biodiversity Assessment* (2005) 9-17.
[9] See generally: *South Africa's National Biodiversity Strategy and Action Plan* (2005) 13-14; Minter L, Burger M, Harrison J, Braack H, Bishop P & Kloepfer D (eds) *Atlas and Red Data Book of the Frogs of South Africa, Lesotho and Swaziland* (2004) SI/MAB Series No.9, Smithsonian Institution Washington DC; Friedmann Y & Daly B (eds) *Red Data Book of the Mammals of South Africa: A Conservation Assessment* (2004) Conservation Breeding Specialist Group Southern Africa & Endangered Wildlife Trust Johannesburg; and Barnes K (ed) *The Eskom Red Data Book of Birds of South Africa, Lesotho and Swaziland* (2000) Birdlife South Africa Johannesburg.
[10] Ibid.
[11] Driver A, Smith R & Maze K *Specialist Review Paper on Biodiversity for the National Strategy for Sustainable Development* (2005) Department of Environmental Affairs and Tourism Pretoria.
[12] National laws of relevance to conservation include: National Environmental Management: Biodiversity Act (10 of 2004); National Environemntal Management: Protected Areas Act (57 of 2003); World Heritage Convention Act (49 of 1999); National Heritage Resources Act (25 of 1999); National Environmental Management Act (107 of 1998); National Forests Act (84 of 1998); Animal Improvement Act (62 of 1998); National Water Act (36 of 1998); Marine Living Resources Act (18 of 1998); Genetically Modified Organisms Act (15 of 1997); Environment Conservation Act (73 of 1989); Forest Act (122 of 1984); Conservation of Agricultural Resources Act (43 of 1983); Plant Improvement Act (53 of 1976); Plant Breeders' Rights Act (15 of 1976); Lake Areas Development Act (39 of 1975); Sea Birds and Seals Protection Act (46 of 1973); and Mountain Catchment Areas Act (63 of 1970). Provincial laws of relevance include: Eastern Cape Parks and Tourism Act (2 of 2010); Northern Cape Nature Conservation Act (9 of 2009); Mpumalanga Tourism and Parks Agency Act (5 of 2005); Provincial Parks Board Act (Eastern Cape) (12 of 2003); Limpopo Environmental Management Act (7 of 2003); Limpopo Tourism and Parks Board Act (8 of 2001); Mpumalanga Nature Conservation Act (10 of 1998); Kwazulu-Natal Nature Conservation Management Act (9 of 1997); and Kwazulu-Natal Nature Conservation Act (29 of 1992).
[13] Statistics South Africa *Mid-Year Population Estimates* (2010) 3.
[14] Government of the Republic of South Africa *Millennium Development Goals: Country Report* (2010) 29.

disease.[15] The latter problems are compounded by the dire state of the country's water treatment and sewage infrastructure.[16] Some 3.3 million people still lack access to adequate and clean water supplies, and a further 15.3 million people lack access to satisfactory sanitation services.[17]

The population continues to grow at a rate of 2.38 % per annum,[18] official unemployment rates remain in the region of 25 %[19] and the desired levels of economic growth required to reduce unemployment and poverty are not being realised.[20] It would therefore appear that the Government is very unlikely to achieve any of the United Nation's Millennium Development Goals[21] and a significant proportion of South Africa's inhabitants will remain locked in the poverty cycle for decades to come.[22]

Ironically, some of the Government's efforts to grow the economy to attain these goals are simultaneously frustrating their realisation. This is best epitomised in the arena of climate change, where the broad impacts of the country's heavy reliance on coal-based

[15] For a comprehensive overview of the latest statistics on these issues, see: *Mid-Year Population Estimates* (2010); and *Millennium Development Goals: Country Report* (2010).
[16] For a comprehensive overview of these issues, see: Department of Water Affairs *Green Drop Report: South African Waste Water Quality Treatment Performance* (2009) (Version 1); and Department of Water Affairs *Blue Drop Report: South Africa's Drinking Water Quality Management Performance* (2010) (Version 1).
[17] Ibid.
[18] *Mid-Year Population Estimates* (2010) 7.
[19] Statistics South Africa *Quarterly Labour Force Survey (Quarter 3)* (2010) vi.
[20] In 2004, the South African Government undertook to halve poverty and unemployment by 2014. In order to meet these commitments, the Government estimated that it would need to grow the economy by on average 4.5 % or higher during the period 2005 to 2009; and 6 % or higher during the period 2010 (The Presidency: Republic of South Africa *Accelerated and Shared Growth Initiative - South Africa (ASGISA) – A Summary* (2006)). This commitment was reiterated in the Government's Medium Term Strategic Framework, published in 2009 (The Presidency: Republic of South Africa *Medium Term Strategic Framework* (2009)). To date, the economy has grown at an average rate of 3.2 % between 2005 and 2009 (*Millennium Development Goals: Country Report* (2010) 112).
[21] Government of the Republic of South Africa *Draft National Climate Change Response Green Paper* (2010) 27. The United Nations *Millennium Development Goals* originated from the development priorities recorded in United Nations *GA Resolution 55/2 (Millennium Declaration)* (2000). They have most recently been complemented by a Global Action Plan to achieve their realisation recorded in United Nations, *GA Resolution 65/1 (2010 World Summit Outome)* (2010). For further information on the Millennium Development Goals, see: http://www.un.org/millenniumgoals/.
[22] For an overview of the extent to which South Africa has progressed towards the realisation of the United Nations *Millennium Development Goals*, see generally: *Millennium Development Goals: Country Report* (2010).

energy generation[23] are acknowledged as undermining the health and well-being of the country's human inhabitants and the state of the country's biological resources.[24]

While evident in urban areas, the above realities are most vividly illustrated in the rural areas of South Africa, which are inhabited by 39 % of the population.[25] These rural areas, which support 70 % of the country's poorest households,[26] are characterised by limited infrastructure, development and employment opportunities.[27] These households live in close proximity to, and depend on, the country's diminishing biological resources for their survival. Therefore, any efforts to conserve the latter have to be aligned with measures to address the socio-economic plight of these rural communities.

1.2 PROTECTION, DISPLACEMENT AND ELITISM

One traditional conservation mechanism used in South Africa to conserve its biological resources is setting aside protected areas. Twenty-one laws currently provide for the designation of over 25 different types of protected areas[28] and to date approximately 6.5 % of South Africa's terrestrial environment and 21.5 % of its coastal environment have been accorded formal protected areas status.[29] As highlighted above, the demise of

[23] Coal currently accounts for approximately 85 % of South Africa's electricity generation capacity and contributes 75 % to its greenhouse gas emissions (*Draft National Climate Change Response Green Paper* (2010) 8-13).
[24] For the most recent restatement of these impacts, see: *Draft National Climate Change Response Green Paper* (2010) 7-28.
[25] *Draft National Climate Change Response Green Paper* (2010) 27.
[26] Ibid.
[27] *National Biodiversity Strategy and Action Plan* (2005) 9.
[28] National laws providing for protected areas include: National Environmental Management: Biodiversity Act (10 of 2004); National Environmental Management: Protected Areas Act (57 of 2003); World Heritage Convention Act (49 of 1999); National Heritage Resources Act (25 of 1999); National Forests Act (84 of 1998); Marine Living Resources Act (18 of 1998); Environment Conservation Act (73 of 1989); National Parks Act (57 of 1976); Mountain Catchment Areas Act (63 of 1970); and Sea Birds and Seals Protection Act (46 of 1973). Provincial laws providing for protected areas include: Provincial Parks Board Act (Eastern Cape) (12 of 2003); Limpopo Environmental Management Act (7 of 2003); Mpumalanga Nature Conservation Act (10 of 1998); Transkei Environmental Conservation Decree (9 of 1992); Kwazulu-Natal Nature Conservation Act (29 of 1992); Nature Conservation Act (Ciskei) (10 of 1987); Protected Areas Act (Bophuthatswana) (24 of 1987); Nature Conservation Ordinance (Transvaal) (12 of 1983); Nature Conservation Ordinance (Cape) (19 of 1974); Bophuthatswana Nature Conservation Act (3 of 1973); and Nature Conservation Ordinance (OFS) (8 of 1969).
[29] Department of Environmental Affairs and Tourism *National Biodiversity Framework* (2009) (published in GN *GG* No. 32474 dated 3 August 2009) 78.

South Africa's biological resources continues at an alarming rate notwithstanding this relatively extensive network of protected areas. Commentators have argued that this is partly due to the country's historic reliance on an exclusionary, protectionist and state-centred approach to conservation.[30]

The Government's historic approach to biodiversity regulation was based on the premise that effective conservation within protected areas required the exclusion of humans from them. The result saw the alienation of conservation from the people, and people from conservation. This policy was particularly clearly reflected in South Africa's pre-2005 protected areas legislation. Express provision for public participation in the formation and management of protected areas was almost entirely absent, as too was recognition of the need to ensure equitable access, use and benefit-sharing. Protected areas were often established on land formerly owned or occupied by indigenous and local communities who were frequently displaced and denied access and use rights.[31]

This problem did not affect protected areas only. With private landownership recorded at approximately 84 % and a large proportion of this land being held by the minority white population, the majority of citizens had no opportunity to access, use and enjoy biological resources situated within South Africa. This was compounded by the absence of a coherent regime for regulating access, use and benefit-sharing associated with biological resources situated on private land. Conservation therefore became regarded

[30] Other issues which have been identified as undermining South Africa's protected areas regime include: the lack of political will; the absence of an adequate planning framework; legislative and institutional fragmentation; reliance on command-and-control strategies; and capacity and resource constraints. See generally: Paterson A "Wandering About South Africa's New Protected Areas Regime" (2007) (1) *SA Public Law* 1-33; Kumleben M, Sangweni S & Ledger J *Board of Investigation into the Institutional Arrangements for Nature Conservation in South Africa: Report* (1998) 9-10; Hanks J & Glavovic B "Protected Areas" in Fuggle R & Rabie A (eds) *Environmental Management in South Africa* (1992) Juta & Co Ltd Cape Town 712-714; and *White Paper on Biodiversity* (1997) 30.

[31] Kumleben *Board of Investigation Report* (1998) 42. See further: Amend T, Ruth P, Eissing S & Amend S *Land Rights are Human Rights: Win-Win Strategies in Sustainable Nature Conservation - Contributions from South Africa* (2008) Sustainability Has Many Faces No.4, GTZ Eschborn 16; and Summers R "Legal and Institutional Aspects of Community-Based Wildlife Conservation in South Africa, Zimbabwe and Namibia" (1999) *Acta Juridica* 188-210.

as an elitist concern, the 'preserve of the privileged members of society';[32] and protected areas the 'playgrounds for the privileged elite'.[33]

Following South Africa's transition to a constitutional democracy in the mid-1990s, the exclusionary, protectionist state-centred approach became subject to increasing domestic criticism. Commentators argued that it was unsustainable especially in a developing economy such as South Africa where broad sectors of society were dependant on accessing biological resources to sustain their livelihoods.[34] Calls were made for the introduction of a more human-centred approach to biodiversity regulation with a focus on community-based natural resource management.[35] It was argued that in order for such an approach to be implemented successfully in South Africa, both within and outside of protected areas, genuine proprietorship, in other words, the right to use resources and determine the mode of usage, distribution of such benefits and rules of access, had to be granted to local communities.[36] In the context of protected areas, critics argued that public participation needed to extend to determining reserve boundaries, preparing management plans and sharing in the economic benefits derived from their establishment.[37] Although various initiatives were undertaken to facilitate local community access to and the use of resources situated within various protected areas, these were few and far between.[38] Accordingly, there were calls for local community participation to be prescribed as a matter of law, rather than retained as a discretionary administrative policy.[39]

[32] Kumleben *Board of Investigation Report* (1998) 42.
[33] *White Paper Biodiversity* (1997) 33.
[34] Summers (1999) *Acta Juridica* 189. See further: Bothma J & Glavovic B "Wild Animals" in Fuggle R & Rabie J (eds) *Environmental Management in South Africa* (1992) Juta & Co Ltd Cape Town 251 & 258.
[35] Mandondo A *Dialogue of Theory and Empirical Evidence: A Weighted Decision and Tenurial Niche Approach to Reviewing the Operation of Natural Resource Policy in Rural Southern Africa* (2005) Commons Southern Africa: Occasional Paper Series No.10, CASS/PLAAS Harare/Bellville 11; and Summers (1999) *Acta Juridica* 191.
[36] Murphree M *Communities as Resource Management Institutions* (1992) Gatekeeper Series No.36, IIED London 11.
[37] Bothma & Glavovic "Wild Animals" in *Environmental Management in South Africa* (1992) 258.
[38] See the examples cited in: Kumleben *Board of Investigation Report* (1998) 44-47; and Department of Environmental Affairs and Tourism *People Parks and Transformation in South Africa: A Century of Conservation, A Decade of Democracy* (2003) 48-52.
[39] Bothma & Glavovic "Wild Animals" in *Environmental Management in South Africa* (1992) 258.

1.3 REFORM OF CONSERVATION MANAGEMENT AND LAND-HOLDING PATTERNS

In light of the above, the Government initiated a significant reform process in the late 1990s. It commissioned various policy papers and reports to guide it in revising its approach to biodiversity regulation. The most notable of these were the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* (*White Paper on Biodiversity*)[40] and the *Report of the Board of Investigation into the Institutional Arrangements for Nature Conservation in South Africa*.[41] These documents reflected many of the above criticisms. They advocated a fundamental shift in approach to biodiversity regulation from '… preservation to conservation and sustainable use; from exclusivity to participation and sharing; … from fences and fines to incentives and individual responsibility.'[42] The Government has subsequently been grappling with designing a new legal regime to implement this more inclusive, participatory and human-centred approach to conservation, a process which culminated in the promulgation of the National Environmental Management: Protected Areas Act (Protected Areas Act)[43] and its sister law, the National Environmental Management: Biodiversity Act (Biodiversity Act),[44] some seven years ago. These laws are complemented by an array of domestic policies and plans that highlight the need to expand the country's protected areas network, increase the role of rural communities and communal land within this network, ensure that protected areas realise tangible benefits and facilitate socio-economic development for local communities living adjacent to them.[45]

[40] The *White Paper Biodiversity* (1997) outlines broad proposals for the efficient establishment and management of a representative and effective system of protected areas which promotes sound and sustainable development within, and adjacent to, these areas (27-33).
[41] Kumleben *Board of Investigation Report* (1998). The Report was commissioned by the Minister of Environmental Affairs and Tourism to make recommendations on the following aspects relating to the domestic administration of protected areas: institutional arrangements; classification of protected areas; declaration and management regimes; financing protected areas; and increasing local community involvement.
[42] Department of Environmental Affairs and Tourism *10 Year Review (1994-2004)* (2005) 44.
[43] Act 57 of 2003.
[44] Act 10 of 2004.
[45] These key policies include: Department of Environmental Affairs *National Co-Management Framework* (2010); *National Biodiversity Framework* (2009); Government of South Africa *National Protected Areas*

The above domestic policy shift largely mimicked developments in the international sphere where there was growing adherence to the three central tenets of the *Convention on Biological Diversity,*[46] namely: to conserve biological diversity; to provide for the sustainable use of its components; and to provide for the fair and equitable sharing of the benefits derived from such use.[47] This was accompanied by increasing international acceptance that effective regulation of biodiversity had to be socially and economically relevant and required public support and co-operation.[48] Taking their lead from these developments, several international environmental organisations, most notably the International Union for Conservation of Nature (IUCN), sought to garner support for recognising the existing role, and promoting the extended role, of indigenous peoples and local communities within protected areas as a tool for facilitating this approach.[49]

One mechanism through which the IUCN has sought to generate such support is to provide greater clarity on the diverse forms of protected areas governance, namely who owns, controls, or has the responsibility to manage these areas. This process led to the

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Expansion Strategy for South Africa 2008 (2009); *National Biodiversity Strategy and Action Plan* (2005); and the *National Spatial Biodiversity Assessment* (2005). For a comprehensive discussion of these policies and plans see: Chapter 5 (Part 3.2).

[46] (1992) 31 *ILM* 818.

[47] Article 1.

[48] This has been recognised within many international policy documents and conventions such as: Borrini-Feyerabend G, Kothari A & Oviedo G *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation - Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas* (2004) Best Practice Protected Area Guidelines Series No.11, IUCN/Cardiff University Gland/Cambridge 8-10; Resolution VII.8 on Local Communities and Indigenous People, adopted by the Conference of the Parties (San José, 1999) to the *Convention on the Protection of Wetlands of International Importance Especially as Waterfowl Habitats* (1983) 22 *ILM* 698; *Convention on Biological Diversity* (1992) 31 *ILM* 818 (Article 8(j)); and Munro D & Holgate M (eds) *Caring for the Earth: A Strategy for Sustainable Living* (1991) IUCN, WWF & UNEP Gland 57-63.

[49] See generally: Borrini-Feyerabend G *Strengthening What Works - Recognising and Supporting the Conservation Achievements of Indigenous Peoples and Local Communities* (2010) IUCN/CEESP Briefing Note 10, Cenesta Tehran; Borrini-Feyerabend G (ed) *Bio-Cultural Diversity Conserved by Indigenous Peoples and Local Communities - Examples and Analysis* (2010) Report prepared by ICCA Consortium for GEF, SGP, GTZ, IIED and IUCN/CEESP; Borrini-Feyerabend G & Kothari A *Recognising and Supporting Indigenous and Community Conservation - Ideas & Experiences From the Grassroots* (2008) IUCN/CEESP Briefing Note 9, Cenesta Tehran; Borrini-Feyerabend G *Implementing the CBD Programme of Work on Protected Areas - Governance as Key for Effective and Equitable Protected Area Systems* (2008) IUCN/CEESP Briefing Note 8, Cenesta Tehran; and Beltran J *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (2000) Best Practice Protected Area Guidelines Series No.4, IUCN Gland.

IUCN recently publishing a series of *Guidelines for Applying Protected Areas Management Categories*[50] (*IUCN Management Guidelines (2008)*) which go as far as distilling four protected areas governance types: governance by government;[51] private governance;[52] shared governance; and governance by indigenous peoples and local communities.[53]

While the former two types of governance have been fairly extensively tested globally during the past decade, the latter two are the most novel. These forms of governance are of key relevance to establishing and/or recognising what I refer to as 'communally-conserved areas'. Shared governance (otherwise known as 'co-managed protected areas', 'collaboratively managed protected areas' and/or 'jointly managed protected areas') is defined as:

> '...officially designated protected areas where decision-making power is shared between state agencies and other parties, including indigenous peoples and local communities, and/or NGOs and individuals or the private sector'.[54]

Governance by indigenous peoples and local communities (otherwise referred to as 'indigenous and community conserved areas' and/or 'community conserved areas') is defined as:

> '…protected areas where the management authority and responsibility rest with indigenous peoples and/or local communities through various forms of legal, formal or informal, institutions and rules'.[55]

[50] Dudley N (ed) *Guidelines for Applying Protected Area Management Categories* (2008) IUCN Gland.
[51] Under this form of governance, the protected area is generally owned and managed by a government agency. See further: Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.
[52] Under this form of governance, the protected area is generally owned or managed by a private entity. See further: Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.
[53] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26-32.
[54] Kothari A "Collaboratively Managed Protected Areas" in Lockwood M, Worboys G & Kothari A (eds) *Managing Protected Areas - A Global Guide* (2006) Earthscan London 528.
[55] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.

As with anything novel, there is still much uncertainty regarding the exact nature of protected areas subject to shared governance and governance by indigenous and local communities. If one scrutinises recent relevant literature, guidelines and recently cited practical examples of these forms of governance, as distilled in the *IUCN Management Guidelines (2008)*, it is clear that they include an exceedingly diverse array of land tenure options, institutional frameworks, management structures, access and benefit-sharing arrangements.[56] It is acknowledged that the IUCN's recent effort to delineate these forms of governance, and thereby afford greater recognition to the valuable role played by indigenous and local communities in protected areas governance, is a valuable initiative. There is, however, significant overlap in the proposed governance types and their formulation appears to be largely founded on one component of governance, namely management.[57] Their overlapping nature and the apparent indifference shown to other key components of governance when formulating the four governance types, specifically who owns or controls the land in question, may well come to haunt the practical application and utility of the proposed governance types.[58] Drawing a distinction between these two specific types of governance is therefore perhaps unwise. Perhaps it would be more prudent to refer to them collectively as 'communally-conserved areas' and focus on their common features that have been identified as key to their successful implementation.

[56] See generally: Nelson F (ed) *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa* (2010) Earthscan London; Kothari A, Menon M & O'Reilly S *Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs): How Far Do National Laws and Policies Recognise Them?* (2010) Report prepared for IUCN/CEESP, TILCEPA, WCPA and Kalpavriksh; Borrini-Feyerabend *Strengthening What Works* (2010); Borrini-Feyerabend *Bio-Cultural Diversity* (2010); Borrini-Feyerabend & Kothari *Recognising and Supporting Indigenous and Community Conservation* (2008); Borrini-Feyerabend *Implementing the CBD Programme of Work on Protected Areas* (2008); Blomley R, Nelson F, Martin A & Ngobo M *Community Conserved Areas: A Review of Status and Needs in Selected Countries of Central and Eastern Africa* (2007) Draft Report prepared for TILCEPA, TGER, IUCN/CEESP, SwedBio & WCPA; Goriup P (ed) "Community Conserved Areas" (2006) 16(1) Special Edition of *Parks: International Journal for Protected Areas Managers;* Kothari "Collaboratively Managed Protected Areas" and "Community Conserved Areas" in *Managing Protected Areas - A Global Guide* (2006); Pathak N, Bhatt S, Balasinorwala T, Kothari A & Borrini-Feyerabend G *Community Conserved Areas: A Bold Frontier for Conservation* (2004) TILCEPA, Cenesta Tehran; Oviedo G *Lessons Learned in the Establishment and Management of Protected Areas by Indigenous and Local Communities in South America* (2003) WCPA Ecosystems, Protected Areas and People Project, IUCN Gland; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000).

[57] Paterson A "Clearing or Clouding the Discourse: A South African Perspective on the Utility of the IUCN Protected Areas Governance Typology" (2010) 10(3) *South African Law Journal* 492.

[58] Ibid.

Many countries are experimenting with establishing and recognising a diverse array of CCAs as part of their domestic protected areas networks and some commentators have gone as far as stating that this is perhaps 'the most exciting conservation development of the 21st century'.[59] It is accordingly not surprising that they have been the focus of the bulk of recent attention from international and domestic protected area policy-makers, scholars and managers.[60] It is these CCAs that form the focus of this dissertation, and most specifically the manner in which South Africa has sought to integrate them within its protected areas regime.

If one scrutinises South Africa's contemporary protected areas framework, as principally reflected in the Protected Areas Act, there is a clear acknowledgement that the Government alone cannot halt the rapid demise of the nation's biodiversity. The Act expressly states that the objects of the new protected areas regime can only be achieved in partnership with the people,[61] thereby entrenching a far more human-centred approach based on the premise that one cannot divorce people from conservation and protection from sustainable use. This bodes well for the growth of this new form of protected areas governance in South Africa. Although not afforded express recognition in the Protected Areas Act, the Act does contain an array of legal mechanisms for implementing such an approach. It provides for the establishment of contract reserves on private and communal land;[62] the appointment of private and communal landowners as management authorities for protected areas;[63] and the

[59] Kothari "Community Conserved Areas" in *Managing Protected Areas - A Global Guide* (2006) 549.
[60] See the resources cited in note 56 above.
[61] Section 3(b).
[62] In terms of the Protected Areas Act, private and communal land can be incorporated within a protected area through the conclusion of a written agreement entered into between the landowner and the Minister or relevant provincial Member of the Executive Council (MEC) (section 18(3) (special nature reserves); section 20(3) (national parks); and section 23(3) (nature reserves)). These written agreements must be recorded in a notarial deed and registered against the title deed of the property (section 35(3)(a) read with: section 18(1) (special nature reserves); section 20(1) (national parks); and section 23(1) (nature reserves)).
[63] In terms of the Protected Areas Act, the Minister or relevant MEC must in writing assign the management of the protected area to a management authority (section 38). Such assignment can only take place with the concurrence of the prospective management authority (section 39(1)). The range of persons or institutions to which this function can be assigned includes suitable persons, organisations and organs of state, thereby enabling the Government to devolve the management of protected areas to

conclusion of co-management agreements between the Government and private citizens, communities and organisations.[64]

Owing to the relative novelty of this regime, South Africa's experience with using the above mechanisms to establish and recognise CCAs is currently very limited. That is not to say that the country's experience with seeking to afford such areas recognition is limited. It is just that the majority of this experience has been garnered from a different context, one preceding the entrance of the new protected areas regime, namely land reform.

Following South Africa's transition to a constitutional democracy in the mid-1990s, the country embarked on a massive land reform programme to redress past inequalities. Two key components of this land reform programme are land tenure reform, particularly the move to recognise informal and communal land rights;[65] and land restitution, whereby those persons previously dispossessed of land for political reasons are enabled to reclaim such land.[66] Over 79 000 claims were lodged under the latter component of the programme, of which 75 884 had been settled as of March 2010.[67] Of these settled claims, 43 have dealt with land falling within established protected areas.[68] In the majority of these instances, communal land rights were granted to the land claimants (largely indigenous and local communities) on condition that they agreed: not to reside in the park; to retain the conservation status of the area; and to enter into a

private citizens and communities where suitable.

[64] In terms of the Protected Areas Act, the management authority has discretion to conclude co-management agreements with organs of state, local communities or individuals to co-manage the protected area or regulate human activities affecting it (section 42).

[65] This process is regulated by the Communal Property Association Act (28 of 1996) and Interim Protected of Informal Land Rights Act (31 of 1996).

[66] This process is regulated by the Restitution of Land Rights Act (22 of 1994).

[67] Commission on Restitution of Land Rights *Presentation of Annual Report (2009-2010)* (2010).

[68] Department of Environmental Affairs *Conservation for the People with the People: A Review of the People and Parks Programme* (2010) 37; Department of Environmental Affairs *Status of Land Claims in Protected* Areas (2010) Unpublished document, dated February 2010. These documents state that 121 land claims have been lodged in protected areas, with 43 having been settled to date. However, a closer reading of these documents would appear to illustrate that a total of 141 claims (as opposed to 121 claims) have been lodged in protected areas with 57 claims (as opposed to 43 claims) having been settled to date. Nonetheless, for the purpose of this dissertation, the figures as quoted by the Department of Environmental Affairs shall be used.

contractual park and/or co-management agreement with the conservation authorities.[69] The land is generally held by a communal property institution and leased back to the conservation authorities for due remuneration.[70] The duration of these agreements ranges from fifteen to fifty years.

1.4 CURRENT MANAGEMENT AND SETTLEMENT PATTERNS

The principal mechanism used to settle the majority of these claims would on the face of it appear to be one of co-management, falling under the broader rubric of the shared governance typology, and has been labelled as such by the relevant authorities.[71] This model of governance would also appear to be the Government's favoured choice for settling future land claims within protected areas. This is evidenced by the phraseology contained in the *Memorandum of Agreement*[72] concluded between the former Minister of Agriculture and Land Affairs and Minister of Environmental Affairs and Tourism in May 2007, the express purpose of which is to guide the resolution of all outstanding restitution claims in protected areas.

However, below the surface of these settlement arrangements, there appears to be a diverse array of governance options at play. These vary in respect of land tenure, institutional structures, management options, and access and benefit-sharing schemes. This diversity clearly illustrates the frailty of the four IUCN governance typologies in the context of CCAs. These areas do not appear to fall neatly into the four typologies proposed in the *IUCN Management Guidelines* (2008), which may pose significant problems for the Government seeking to report on its obligations under the *Convention on Biological Diversity*, specifically with the *Programme of Work on Protected Areas*

[69] This approach has now been concretised in two recent documents published by the Government: Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007); and Department of Environmental Affairs *National Co-Management Framework* (2010).
[70] Ibid.
[71] Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007).
[72] Ibid.

adopted by signatories at COP7.[73] It would accordingly appear desirable to formulate a more nuanced array of governance typologies which better account for the array of governance options, particularly those at play in the context of CCAs. The South African context provides a useful microcosm for illustrating these frailties and attempting to distil a revised set of governance typologies.

This analysis provides a process for evaluating the success of South Africa's treatment of CCAs to date, as a tool for bridging the gap between land reform and conservation, and promoting the participation of indigenous peoples and local communities within protected areas management. While some have lauded South Africa's co-management model as a great success in achieving this somewhat elusive goal,[74] it is subject to increasing domestic criticism in that it has largely failed to achieve an equitable balance between conservation and land reform imperatives; local communities are frequently excluded from accessing the resources situated in the protected areas and participating in its management; and few resources or benefits have flowed back to the local communities.[75] Commentators have argued that the Government has been misguided

[73] *Convention on Biological Diversity* (1992) 31 *ILM* 818, Decision VII/28.

[74] The most frequently cited example in this regard is the Makuleke claim to the northern Pafuri Region of the Kruger National Park. See generally: Fabricius C "The Makuleke Story, South Africa" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 537; Reid H "Contractual National Parks and the Makuleke Community" (2002) 29(2) *Human Ecology* 135-155; Ramutsindela M "The Perfect Way to Ending a Painful Past? Makuleke Land Deal in South Africa" (2002) 33 *GeoForum* 15-24; Steenkamp C & Uhr J *The Makuleke Land Claim: Power Relations and Community-Based Natural Resource Management* (2000) Evaluating Eden Series Discussion Paper No.18, IIED London; and De Villiers B *Land Claims and National Parks: The Makuleke Experience* (1998) HSRC Press Pretoria.

[75] See generally: Benjaminsen A, Kepe T & Brăthen S "Between Global Interests and Local Needs: Conservation and Land Reform in Namaqualand, South Africa" (2008) 78(2) *Africa* 223-244; Kepe T "Land Claims and Co-management of Protected Areas in South Africa: Exploring the Challenges" (2008) 41 *Environmental Management* 311-321; Bradstock A *Key Experiences of Land Reform in the Northern Cape Province of South Africa* (2005) FARM-Africa Policy & Research Series, FARM-Africa London; Kepe T, Wynberg R & Ellis W "Land Reform and Biodiversity Conservation in South Africa: Complementary or in Conflict" (2005) 1 *International Journal of Biodiversity Science and Management* 3-16; Kepe T, Saruchera M & Whande W "Poverty Alleviation and Biodiversity Conservation: A South African Perspective" (2004) 38(2) *Oryx* 143-145; Palmer R *From Title to Entitlement: The Struggle Continues at Dwesa-Cwebe* (2003) Fort Hare Institute of Social and Economic Research Working Paper No.46, University of Fort Hare Alice; Ramutsindela M "Land Reform in South Africa's National Parks: A Catalyst for the Human-Nature Nexus" (2003) 20 *Land Use Policy* 41-49; De Villiers B *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) Occasional Paper Series, KAS Johannesburg; Isaacs M & Mohammed N *Co-Managing the Commons in the 'New' South Africa: Room to Manoeuvre* (2000) Commons Southern Africa: Occasional Paper No.5, CASS/PLAAS Harare/Bellville; and Kepe T "Communities, Entitlements and Nature Reserves: The Case of the Wild Coast" (1997) 28 *South Africa IDS Bulletin* 47-58.

and inflexible in the application of co-management and that the entire process has been driven or clouded by an underlying outdated and exclusionary conservation agenda.[76]

This growing criticism and dissatisfaction on the part of successful land claimants may have contributed to the existence of approximately 78 validated, yet unsettled claims for land situated within several of South Africa's protected areas.[77] These claims are extensive and have potential to have a significant impact on South Africa's established protected areas network and the Government's role as trustee of the nation's biological resources.[78]

What is interesting in this regard is that the Government appears to remain in a real quandary regarding how to approach the settlement of these claims. In a statement released by the Cabinet in January 2009, it was stated that 'equitable redress' and not 'co-management' is the only model for resolving the significant outstanding land claims in the Kruger National Park.[79] Some twenty months later, the Government published a *National Co-Management Framework*[80] that proposes co-management as the desired model. The initial drafts of the *National Co-Management Framework* expressly recognised the disjuncture between Government policy and community expectation in its opening paragraph:

> '…there is a high expectation from communities with claims in protected areas that co-management is the same as joint-management, that the eventual outcome of the co-management process is community driven management and that this will be achieved through a long term process of capacity building.'[81]

[76] Ibid.
[77] SANParks *Annual Report (2007/2008)* (2008). See further: *Conservation for the People with the People* (2010) 37; *Status of Land Claims in Protected Areas* (2010); and Commission on Restitution of Land Rights *Presentation of Annual Report (2008/2009)* (2009).
[78] The Government is appointed as the trustee of the nation's biological resources under the Biodiversity Act (section 2).
[79] Cabinet "State Announces Decision on Kruger National Park Land Claims" *Press Release* dated 28 January 2009.
[80] *National Co-Management Framework* (2010).
[81] Department of Environmental Affairs and Tourism, Department of Land Affairs, SANParks, Ezemvelo Wildlife & Eastern Cape Parks *Draft National Co-Management Framework* (2009) para. 1.1.

In an effort to resolve this disjuncture, three nuanced models for co-management are proposed, namely: full co-management;[82] full lease;[83] and part co-management.[84] While the proposition of a diverse set of 'co-management' models appears to be a move in the right direction, the exact nature of the three models remains unclear. Furthermore, a thorough reading of the *National Co-Management Framework* would appear to indicate that the 'contemporary' proposal reverts to the troublesome narrow vision of co-management traditionally relied upon by the Government under which conservation authorities generally controlled and managed, and indigenous and local communities received some form of predominantly financial benefit for relinquishing their residence, access and use rights. This is reflected in the *National Co-Management Framework's* heavy focus on the 'full lease model' which, by document's authors own admission, affords conservation authorities almost carte blanche to manage the area to the exclusion of the land claimants.[85] This approach is patently at odds with the country's requisite policy and statutory framework which, as previously mentioned, expressly recognises the need to foster community-based natural resource management and that the protected areas framework needs to be implemented in partnership with the people.

South Africa accordingly appears to be some way off in, or perhaps heading in the wrong direction for, achieving the equitable and effective balance between its land reform and conservation agenda through the vehicle of CCAs. It is this currently fraught area that the dissertation seeks to address. We are not alone in this enterprise. Several foreign jurisdictions have relatively recently been grappling with similar issues, most notably Australia,[86] Canada[87] and Namibia.[88] The issues are complex. The vested interests are vast. The stakes are high. The solutions are neither simple nor resolved.

[82] Under this model, compensation for no physical occupation will take the form of socio-economic beneficiation and participation in co-management. The application of this model is anticipated for those circumstances where viable socio-economic opportunities exist within the protected area.
[83] Under this model, the Government will lease the land from the land claimants. The application of this model is anticipated for those circumstances where few (if any) socio-economic opportunities exist and would result in inadequate compensation for loss of beneficial occupation. Treasury approval will be required for this model.
[84] This model will constitute a blend of the two former models.
[85] *National Co-Management Framework* (2010) 8.
[86] See generally: Smyth D "Indigenous Protected Areas in Australia" (2006) 16(1) *Parks* 14-20; and Szabo S & Smyth D "Indigenous Protected Areas in Australia: Incorporating Indigenous Owned Land into

2. KEY ISSUES FOR CONSIDERATION

This dissertation seeks to explore the primary question of whether CCAs provide a useful tool for bridging the gap between South Africa's conservation and land reform agendas. In order to satisfy the imperative, especially within the environmental discipline, for legal research to be of theoretical and practical relevance and value, the dissertation explores seven subsidiary questions. First, how do the three concepts of the natural commons, protected areas and governance relate to one another? Secondly, what are CCAs and why have they become a prominent form of protected areas governance? Thirdly, what elements underpin successful CCAs? Fourthly, how does South Africa's current legal framework provide for CCAs to balance the country's conservation and land reform agendas? Fifthly, how has this legal framework been implemented to date to provide for CCAs? Sixthly, has the implementation of this legal framework been successful and to what extent does it reflect the elements identified by international protected areas scholars as integral to well-functioning CCAs? Finally, how can South Africa's regime as regards CCAs be improved to strike an optimal balance between the country's conservation and land reform agendas?

3. STRUCTURE AND METHOD

In this dissertation, the main and subsidiary research questions are considered from a theoretical and practical perspective. The nature of the legal analysis is a collection and ordering of existing legal norms to provide insight into the regulation of the relationship between conservation and land reform, accompanied by a critical analysis of such norms in view of their practical efficacy in dealing with this often vexed relationship.

Australia's National System of Protected Areas' in Jaireth H & Smyth D (eds) *Innovative Governance: Indigenous Peoples, Local Communities and Protected Areas* (2003) Ane Books New Delhi.

[87] See generally: Brown J, Lyman M & Proctor A "Community Conserved Areas: Experience from North America" (2006) 16(1) *Parks* 35-42.

[88] See generally: Holden P, Grossman D & Jones B "Community Conserved Areas in Some Southern African Countries" (2006) 16(1) *Parks* 68-73; and Bandyopadhyay S, Humavindu M, Shyamsundar P & Wang L *Do Households Gain from Community-Based Natural Resource Management? An Evaluation of Community Conservancies in Namibia* (2004) World Bank Policy Research Working Paper No.3337, Washington DC.

Drawing from the structure of the core and subsidiary research questions outlined above, the dissertation is divided into four main parts.

3.1 PART I – THE CONTEXT

The first part analyses four contextual issues requiring consideration prior to addressing the primary question underpinning this dissertation. The first issue relates to the main objective of CCAs - managing the natural commons. What are the natural commons? How does one theoretically and practically seek to regulate and manage the natural commons? How have the debates about natural commons regulation and management shifted over the past half-century or so? The second issue follows on from the above enquiry and relates to the form of CCAs – protected areas. What are protected areas? What is their general form and nature? Have contemporary debates about protected areas governance assisted in developing a coherent common language for understanding, planning for and recording their diversity of forms across the globe? Finally, have these debates fostered an appropriate understanding of the link between communal property regimes, common-pool natural resources and protected areas? These two aspects are considered in Chapter 2 (titled *The Role of Protected Areas as a Tool for Managing the Natural Commons*).

The third issue relates to the nature of CCAs. What do I mean by a CCA? How does this concept differ from or relate to previously defined forms of governance? How have significant shifts in economic, property rights, ecology, human rights and conservation discourses contributed to their rise in prominence in the past decade? The fourth issue relates to the third. What general elements are relevant to their successful implementation? These two aspects are considered in Chapter 3 (titled *The Nature Form and Factors Influencing Communally-Conserved Areas*).

3.2 PART II – THE LAW

Having distilled the objective, nature, form and essential elements of CCAs in Part I of the dissertation, Part II considers the manner in which South Africa's legal framework provides for their domestic introduction. The requisite domestic legal framework sits somewhat uncomfortably between two legal regimes, namely conservation and land reform. Both legal regimes have undergone significant transformation in the past decade or so. Many different authorities administer these legal regimes. Their actions are in turn informed by a diverse array of domestic policies and programmes. Furthermore, overarching these two legal regimes is South Africa's comprehensive constitutional dispensation. It provided the mandate for, and framework within which, the contemporary conservation and land reform regimes were formulated and are implemented.

Part II is divided into four chapters. Commencing from the broadest perspective, Chapter 4 (titled *South Africa's Constitutional Regime of Relevance to Communally-Conserved Areas*) examines South Africa's constitutional dispensation, specifically the relevant constitutional rights it grants citizens and the relevant competences it affords the different spheres of government to make and administer laws of relevance to CCAs. Chapter 5 (titled *South Africa's Conservation Regime of Relevance to Communally-Conserved Areas*) considers South Africa's conservation regime, specifically the laws, policies and institutions that respectively inform, provide for and administer CCAs. Chapter 6 (titled *South Africa's Land Reform Regime of Relevance to Communally-Conserved Areas*) comprises of a similar examination of the domestic laws, policies and institutions at play in South Africa's land reform regime. Integrated within Chapters 4, 5 and 6 is a critical analysis of the factors which have shaped South Africa's contemporary conservation and land reform regimes, and which have similarly influenced the domestic implementation of CCAs. Chapter 7 (*Linking South Africa's Conservation and Land Reform Regimes*) concludes this part of the dissertation by surveying recent domestic efforts to traverse the artificial and dysfunctional divide between the conservation and land reform regimes. This survey critically canvasses

both recent tangible efforts by domestic policy-makers to do so and the untapped options prevalent in South Africa's domestic legal framework for doing so.

3.3 PART III – THE PRACTICE

Having canvassed South Africa's policy, legal and institutional framework of relevance to the domestic implementation of CCAs in Part II of this dissertation, Part III evaluates the manner in which administrators have sought to implement it. This evaluation is undertaken through two distinct yet related enquiries: first, through the consideration of four domestic case studies; and secondly, by way of an assessment of the extent to which these case studies reflect the presence or absence of the essential elements underlying CCAs highlighted in Part I (specifically Chapter 3).

Part III is accordingly divided into two chapters. Chapter 8 (titled *South Africa's Experimentation with Communally-Conserved Areas*) considers four South African case studies in which domestic administrators have sought to use the legal framework discussed in Part II to bridge the country's conservation and land reform agendas. These case studies are the Richtersveld National Park, the Pafuri Region of the Kruger National Park, the Dwesa-Cwebe Nature Reserve and the Eastern Shores Region of the Isimangaliso Wetland Park. The four selected case studies are the most well documented in South Africa and have been central to shaping the country's contemporary legal regime of relevance to CCAs. Within this chapter I briefly set out the history of each CCA and detail the different governance options and elements that underpin them. Chapter 9 (titled *Evaluating South Africa's Experimentation with Communally-Conserved Areas*) critically assesses the extent to which the case studies reflect adherence to the essential elements that theoretically underlie successful CCAs. This chapter does not provide an exhaustive analysis of the extent to which each case study reflects the presence or absence of each of these elements. It rather seeks to draw pertinent examples from the four case studies which illustrate the challenges faced by domestic policy-makers in giving domestic effect to these elements, highlight

inherent strengths and frailties of the existing legal framework and which hold lessons for future legislative reform.

3.4 PART IV – THE SOLUTION

Part IV of the dissertation seeks to plot the way forward for the extended use of CCAs as a tool for bridging South Africa's conservation and land reform imperatives. Chapter 10 (titled *Tweaking the Legal Landscape to Improve its Effectiveness and Sustainability*) seeks to distil a series of concrete recommendations on how to tweak the current domestic legal framework regime to create a more effective and sustainable regime for CCAs. In doing so, it draws together the following key aspects discussed in the previous chapters of the dissertation. First, the elements identified by international and domestic scholars during the past two decades as essential to the proper regulation of the natural commons and CCAs (discussed in Chapters 2 and 3). Secondly, the strengths and weakness of South Africa's current regime of relevance to CCAs (discussed in Chapters 4, 5, 6 and 7). Thirdly, how these are manifest in several domestic case studies (discussed in Chapters 8 and 9).

PART I

THE CONTEXT

As has been highlighted above, the key research question to be addressed in this dissertation is whether communally-conserved areas provide a useful tool for bridging the gap between South Africa's conservation and land reform agendas. Prior to considering this question in any detail it is essential to seek out, circumscribe and understand its context. This involves a consideration of four main aspects. The first relates to the object of a communally-conserved area – managing the natural commons. What are the natural commons? How does one theoretically and practically seek to regulate and manage the natural commons? How have the debates about natural commons regulation and management shifted over the past half-century or so? The second aspect requiring attention follows on from the above enquiry and relates to the form of a communally-conserved area – a protected area. What are protected areas? What is their general form and nature? Have contemporary debates about protected areas governance assisted in developing a coherent common language for understanding, planning for and recording the diversity of forms across the globe? Finally, have these debates fostered an appropriate understanding of the link between communal property regimes, common-pool natural resources and protected areas? These two aspects are considered in Chapter 2 of the dissertation (titled *The Role of Protected Areas as a Tool for Managing the Natural Resources*). The third aspect relates to the nature of 'communally-conserved areas'. What do I mean by a 'communally-conserved area'? How does this concept differ from or relate to previously defined forms of governance? How have significant shifts in economic, property rights, ecology, human rights and conservation discourses contributed to their rise in prominence in the past decade? The fourth aspect relates to the third, what general elements are relevant to their successful implementation? These two aspects are considered in Chapter 3 of the dissertation (titled *The Nature, Form and Factors Influencing Communally-Conserved Areas*).

CHAPTER 2

THE ROLE OF PROTECTED AREAS AS A TOOL FOR MANAGING THE NATURAL COMMONS

1. INTRODUCTION

In contextualising the nature of communally-conserved areas (CCAs), two main aspects must be considered. The first relates to the object of a CCA – managing the natural commons. What are the natural commons? How does one theoretically and practically seek to regulate and manage the natural commons? How have the debates about natural commons regulation and management shifted over the past half-century or so? The second aspect requiring attention follows on from the above enquiry and relates to the form of a CCA – a protected area. What are protected areas? What is their general form and nature? Have contemporary debates about protected areas governance assisted in developing a coherent common language for understanding, planning for and recording the diversity of forms across the globe? Finally, have these debates fostered an appropriate understanding of the link between communal property regimes, common-pool natural resources and protected areas?

2. THE NATURAL COMMONS, COMMON PROPERTY AND COMMON POOL RESOURCES

> 'In the literature on natural resources and environmental policy, it would be difficult to find an idea (a concept) that is as misunderstood as that of the commons and common property.'[1]

[1] Bromley D "The Commons, Property and Common Property Regimes" (1990) Unpublished paper presented at first Annual Meeting of the International Association for the Study of Common Property, Duke University, September 1990, 1.

2.1 DEFINING THE NATURAL COMMONS

Finding its origins in the work of property rights theorists such as Gordan,[2] Scott[3] and Demsetz,[4] and brought to global notoriety in 1968 by Hardin[5] in his controversial article 'The Tragedy of the Commons',[6] the concept of the commons, particularly in the context of natural resources, has been, and remains, the subject of ongoing debate as commentators seek to unpick its ambiguity. Notwithstanding the protracted duration of these debates, traversing almost sixty years, a clear definition of the commons remains as elusive as consensus on how best to regulate it.

What is clear is that the notion of the commons is integrally related to issues of land tenure and property rights,[7] and it is for this reason that it is frequently used interchangeably with terms such as 'common property', 'common property resources' or 'common pool resources', all of which are the subject of extensive academic attention.

In its simplest sense, 'common property', as it applies to natural resources, has been defined as 'a distribution of property rights in resources in which a number of owners are co-equal in their rights to use the resource' with 'property' referring to 'a bundle of rights in the use and transfer ... of natural resources'.[8] This understanding of the 'commons' as 'common property' has caused much controversy. Drawing on a rise in documented case studies of successful community-based natural resource management initiatives across the globe, many commentators now argue that conflating

[2] Gordan H "The Economic Theory of a Common Property Resource: The Fishery" (1954) 62 *Journal of Political Economy* 124-142.
[3] Scott A "The Fishery: The Objectives of Sole Ownership" (1955) 63 *Journal of Political Economy* 116-124.
[4] Demsetz H "Toward a Theory of Property Rights" (1967) 57 *American Economic Review* 347-359.
[5] Hardin G "The Tragedy of the Commons" (1968) 162 *Science* 1243-1247.
[6] According to Hardin, drawing on an example of a group of herdsman grazing a common pasture, 'Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.' (Hardin (1968) *Science* 1244).
[7] Cotula L, Odhiambo M, Orwa N & Muhanji A (eds) *Securing the Commons in an Era of Privatisation: Policy and Legislative Challenges* (2005) Securing the Commons Series No.10, IIED London 1.
[8] Ciriacy-Wantrup S & Bishop R "'Common Property' as a Concept in Natural Resources Policy" (1975) 15 *Natural Resources Journal* 714.

the 'commons' with 'common property', erroneously superimposes Hardin's Tragedy of the Commons, and its array of common assumptions,[9] onto settings where it is of little relevance, specifically those where common-pool natural resources are sustainably held and used under communal ownership.[10] Some scholars have gone as far as arguing that the ambiguity it causes has been manipulated in the past to further global political agendas seeking, through privatisation and state control, to entrench exclusionary, protectionist, state-centred approaches to conservation in areas previously subject to communal ownership by indigenous peoples and local communities.[11] In the words of Ostrom *et al*, Hardin's Tragedy of the Commons 'has been used by many scholars and policy-makers to rationalize central government control of all common-pool resources and to paint a disempowering, pessimistic vision of the human prospect'.[12]

Contemporary property rights and economic theorists have accordingly called for a separation between two aspects in order to foster a better understanding of the commons, namely: the intrinsic nature of the resource system; and the nature of property rights applicable to it.[13] Regarding the intrinsic nature of the resource system, one is ordinarily dealing with 'common property resources' or 'common pool resources'.

[9] These assumptions include: all common natural resources suffer the same fate irrespective of the applicable property rights regime; when dealing with common natural resources, demand will always exceed supply; the behaviour of individual resource users is unconstrained by existing institutional arrangements; individual resource users are incapable of co-operating toward their common interest (the sustainable management of the common natural resource); and these resource users are incapable of creating or altering the rules applicable to common natural resources. See further: Feeny D, Berkes F, McCay B & Acheson J "The Tragedy of the Commons: Twenty-Two Years Later" (1990) 18(1) *Human Ecology* 12; and Berkes F, Feeny D, McCay B & Acheson J "The Benefits of the Commons" (1989) 340 *Nature* 93.

[10] See generally: Basurto X & Ostrom E "The Core Challenges of Moving Beyond Garrett Hardin" (2009) 1 *Journal of Natural Resources Policy Research* 255-259; Van Laerhoven F & Ostrom E "Traditions and Trends in the Study of the Commons" (2007) 1(1) *International Journal of the Commons* 3-28; Monu E "The Tragedy or Benefits of the Commons? Common Property and Environmental Protection" (2005) 9(1) *Botswana Journal of African Studies* 81-95; Ostrom E "Reformulating the Commons" (2002) *Ambiente & Sociedade* 1-21; Ostrom E, Burger J, Field C, Norgarrd R & Policansky D "Revisiting the Commons: Local Lessons and Global Challenges" (1999) 284 *Science* 278-282; Ostrom E *Governing the Commons: The Evolution of Institutions for Collective Action* (1990) Cambridge University Press New York; Feeny et al (1990) *Human Ecology* 1-19; Berkes et al (1989) *Nature* 91-93; Berkes F (ed) *Common Property Resources: Ecology and Community-Based Sustainable Development* (1989) Belhaven Press London; and McCay B & Acheson J *The Question of the Commons: The Culture and Ecology of Communal Resources* (1987) University of Arizona Press Tucson.

[11] See for instance: Cotula et al *Securing the Commons in an Era of Privatisation* (2005) 2; and Monu (2005) *Botswana Journal of African Studies* 82.

[12] Ostrom et al (1999) *Science* 278.

[13] Ibid.

Berkes defines 'common property resources' as '... a class of resources for which exclusion is difficult and joint use involves subtractability'.[14] Ostrom defines 'common pool resources' as 'natural ... resources in which (i) exclusion of beneficiaries through physical and institutional means is especially costly, and (ii) exploitation by one user reduces resource availability for the others'.[15] It is accordingly not surprising that these two terms are frequently used interchangeably. What both definitions do highlight are the two fundamental characteristics of these common resources, namely the difficulty of exclusion and the principle of subtractability.

Regarding the nature of property rights applicable to these resources, several scholars[16] draw a clear distinction between four different property rights regimes at play in the context of common-pool resources, namely: private property;[17] state property;[18] communal property (also sometimes referred to rather confusingly as common property or the commons);[19] and open-access regimes.[20] It is the latter two regimes that historically have been somewhat misunderstood and used interchangeably, creating confusion. If one retains a clear distinction between 'communal property' and 'open-access' regimes, Hardin's Tragedy of the Commons is theoretically of little relevance to the former, where 'co-owners' have both a defined set of reciprocal rights and duties in respect of the land (minimising the impacts of the subtractability principle) and the authority to exclude non-owners (alleviating the problems of exclusion).[21] The practical validity of this hypothesis has been vividly illustrated by several studies of communal

[14] Berkes et al (1989) *Nature* 92.
[15] Ostrom (1999) *Science* 278.
[16] See for example: Bromley "The Commons, Property and Common Property Regimes" (1990) 1; Berkes et al (1989) *Nature* 91; and Ciriacy-Wantrup & Bishop (1975) *Natural Resources Journal* 714-716.
[17] The individual owner has the right to reasonably use (and a reciprocal duty to conserve) the natural resources situated on the property. The owner also has the right to exclude such use by non-owners.
[18] The state either owns or holds the property in trust for the general public. The property is generally managed by a government authority, which has the right to grant access and use rights to non-owners. This form of property would constitute *res publicae* under the common law.
[19] Defined groups of co-owners have a right to reasonably use (and a reciprocal duty to conserve) the natural resources situated on the property, and exclude such use by non-owners. This form of property would constitute *res communes* under the common law.
[20] There is no defined owner or user with preferential use rights. The property and/or natural resource in question are accessible to everyone and may accordingly be used freely. This form of property would constitute *res nullius* under the common law.
[21] Coelho M, Filipe J & Ferreira M *Tragedies on Natural Resources - A Commons and Anticommons Approach* (2009) Working Paper No.21, School of Economics and Management, Technical University of Lisbon 7.

property regimes undertaken in the past couple of decades which have found communities to be far more activist; devising, maintaining and adapting communal arrangements to successfully self-manage common-pool natural resources.[22] These studies have interestingly also illustrated that subtractability and exclusion conundrums also arise under private and state property regimes.[23] The nature of the property rights regime under which the common-pool resource is held does not appear itself to determine tragedy or success, as originally anticipated. The situation is far more complex and management success is determined by a broad array of additional factors including the nature of the resources and the social, political, institutional, cultural and physical context within which they are situated.

Owing to the above complexities potentially impacting on the success or failure of communal property regimes, it is vital to understand that the term property in this context 'refers not to an object or a natural resource but rather to the benefit stream that arises from the use of that object or resource'.[24] If one thinks of common property in this sense, one recognises the importance of property as a 'social relation' and that communal property rights are effectively 'a set of economic and social relations defining the position of each individual with respect to the utilisation of scarce resources' as opposed to a 'relationship between men and things'.[25] As mentioned above, in order to understand how to manage the commons effectively, one needs to grapple with the myriad factors which impact on the 'social relation'.

It is this aspect of the 'natural commons', specifically the rights and duties to natural resources held under communal ownership, which is the focus of this dissertation. It draws a distinction between communal property and state property, private property and importantly open-access regimes. It embraces the varied form and nature of natural resource rights that may be held under communal ownership. It recognises the

[22] See the summary of several relevant studies in Feeny et al (1990) *Human Ecology* 6-12.
[23] Ibid.
[24] Coelho et al *Tragedies on Natural Resources* (2009) 4. See further: Bromley "The Commons, Property and Common Property Regimes" (1990) 2-3; and Furubotn E & Pejovich S "Property Rights and Economic Theory: A Survey of Recent Literature" (1972) 10(4) *Journal of Economic Literature* 1137-1163.
[25] Ibid.

importance of understanding the economic, social and cultural elements underpinning common property regimes when seeking to create or evaluate them. It debunks the historical use of the 'Tragedy of the Commons' as a rationale for undermining local and indigenous communal tenure and community-based natural resource management regimes. Finally, it will provide a clearer lens through which to analyse and give effect to commons regulation within protected areas.

2.2 REGULATING THE NATURAL COMMONS THROUGH COMMUNAL PROPERTY REGIMES

Historically undermined by colonialism and on occasion megalomaniacal local leaders for personal gain,[26] communal property regimes are increasingly recognised as having a significant role to play in natural resource management. Their rise in prominence appears to be closely tied to the emergence of concepts such as community-based natural resources management and community-based conservation in the past two decades.[27] This is not surprising, as common-pool resources and communal property regimes frequently lie at the heart of such conservation initiatives.

As a result, the debates relating to these communal property regimes and their relationship to managing common-pool natural resources have significantly shifted in the past two decades. With the original focus[28] of attention falling on the applicability or inapplicability of Hardin's Tragedy of the Commons to such communal property regimes, the current focus[29] is on distilling an array of essential elements which foster or

[26] Bromley "The Commons, Property and Common Property Regimes" (1990) 4-13. See further Murphree M *Communities as Resource Management Institutions* (1992) Gatekeeper Series No.36, IIED London 3-5.

[27] These concepts are considered in detail in Chapter 3.

[28] See generally: Feeny et al (1990) *Human Ecology* 1-19; Bromley "The Commons, Property and Common Property Regimes" (1990) 1-25; Berkes et al (1989) *Nature* 91-94; and Ciriacy-Wantrup & Bishop (1975) *Natural Resources Journal* 714-716.

[29] See generally: Basurto & Ostrom (2009) *Journal of Natural Resources Policy Research* 255-259; Cross-Sectoral Commons Governance In Southern Africa Project *Commons Governance in Southern Africa* (2009) Policy Brief No.28, PLAAS Bellville 1-3; Roe et al *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (2009) Natural Resource Issues No.18, IIED London; Murphree *Communities as Resource Management Institutions* (1992) 1-14; Monu (2005) *Botswana Journal of African Studies* 81-95; and Ostrom (2002) *Ambiente & Sociedade* 1-21.

undermine their role as potential effective institutions for overcoming the limitations of privatisation and state regulation, Hardin's proposed solution for overcoming the Tragedy.[30]

So what are these elements that are emerging from the pyre of Hardin's Tragedy? Perhaps the most definitive statement of these elements has been put forward by Ostrom who distilled the following eight 'Design Principles Illustrated by Long-Enduring Common-Pool Resource Institutions':[31]

- *clearly defined boundaries* - for the common-pool resource.
- *congruence* - between the distribution of benefits and associated costs imposed by operational rules providing for the use and regulation of the common-pool resource.
- *collective-choice arrangements* - which enable individuals affected by the operational rules to participate in their formulation and modification.
- *monitoring* - effective, accountable and transparent monitoring of the state of the common-pool resources and user behaviour.
- *graduated sanctions* - imposed by members of the community, government officials or both on individuals who violate the operational rules.
- *conflict-resolution mechanisms* - readily accessible, low cost and locally situated conflict-resolution mechanisms for resolving disputes between individuals and/or the community and officials.
- *minimum recognition of rights to organise* - recognition of the rights of the community to devise and create their own institutions with little interference of external government interference.

[30] Whilst these solutions were not proposed in Hardin's original treatise, he subsequently proposed private enterprise and socialism (control by government) as solutions for overcoming the Tragedy of the Commons. See Hardin G "Political Requirements for Preserving our Common Heritage" in Brokaw H (ed) *Wildlife and America* (1978) Council on Environmental Quality Washington DC 310-317.
[31] Ostrom (2002) *Ambiente & Sociedade* 10-11; and Ostrom *Governing the Commons* (1990) 90.

- *nested enterprises* - 'appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organised in multiple layers of nested enterprises'.

To these I would add *supportive legal and policy structures* that enable communities to self-organise, recognise their institutions and operational rules, and affords clear and defined tenure rights over common-pool resources.[32]

Several authors have sought to distil an array of additional elements which facilitate the communal ownership and management of common-pool natural resources in the Southern African context. [33] Drawing on the 'Institutional Conditions for Sustainable Natural Resource Management Related to Decentralisation and Rural Autonomy',[34] Monu identifies the following: provision of incentives for resource users to sustainably manage the natural resources; a recognised governance structure to control access and membership; recognition and integration of indigenous knowledge or a combination of western and indigenous knowledge within the regulatory institutions; existence of self-governing local institutions in the resource area; meaningful participation of local resource users in the decisions that affect the management of the resource/s; provision for a communal level conflict resolution mechanism; and the creation, through national and regional policies and institutions, of an enabling environment for sustainable

[32] This additional criterion is alluded to by Ostrom (2002) *Ambiente & Sociedade* 16. See further Cross-Sectoral Commons Governance In Southern Africa Project *Commons Governance in Southern Africa* (2009) 2.

[33] For a general discussion of CBNRM in Southern Africa, see: Nelson F (ed) *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa* (2010) Earthscan London; Roe et al *Community Management of Natural Resources in Africa* (2009); Mukamuri B, Manjengwa J & Anstey S (eds) *Beyond Proprietorship: Murphree's Laws on Community-Based Natural Resource Management in Southern Africa* (2009) Weaver Press Harare; Fabricius C, Koch E, Magome H & Turner S (eds) *Rights, Resources and Rural Development: Community-Based Natural Resource Management in Southern Africa* (2004) Earthscan London; Benjaminsen T, Cousins B & Thompson L (eds) *Contested Resources: Challenges to the Governance of Natural Resources in Southern Africa* (2002) PLAAS Bellville; and Fabricius C, Koch E & Magome H *Community Wildlife Management in Southern Africa: Challenging the Assumptions of Eden* (2001) Evaluating Eden Series No.6, IIED London.

[34] Associated in Rural Development Inc. *Decentralisation and Local Authority: Conditions for Achieving Sustainable Natural Resource Management* (1992) Washington DC.

resource use including clear rules of tenure, adequate enforcement; and relevant education and extension support.[35]

Hulme, Hutton and Murphree further argue that unless contemporary policies on land tenure and conservation seriously consider community-based natural resource management regimes, there is little reason to be optimistic about the future of conservation.[36] Murphree identifies the following as key principles for successfully implementing regimes of this nature: effective management of natural resources is best achieved by providing a 'focused value for those who live with them'; 'differential inputs must result in differential benefits'; there must be a positive relationship between the 'quality management and the magnitude of benefits'; genuine 'proprietorship'[37] over the natural resources must be granted to local communities; the 'unit of such proprietorship should be the unit of production, management and benefit'; and the 'unit of proprietorship should be as small as practicable within ecological and socio-political constraints'.[38]

These international and regionally defined elements provide valuable guidance for not only forging workable communal property regimes for common-pool natural resources but also for perpetuating the relatively recent shift in conservation ideology from exclusionary, state-centred protectionist regimes to more inclusive, participatory and human-centred regimes. This shift, together with the above elements, is discussed more fully in Chapter 3.

[35] Monu (2005) *Botswana Journal of African Studies* 90-92.
[36] See further: Hulme D & Murphree M "Community Conservation in Africa: An Introduction" in Hulme D & Murphree M (eds) *African Wildlife and Livelihoods, The Promise and Performance of Community Conservation* (2001) James Currey Oxford 1-8; Hutton J, Adams W & Murombedzi J "Back to the Barriers? Changing Narratives in Biodiversity Conservation" (2005) 2 *Forum for Development Studies* 341-370; and Murphree *Communities as Resource Management Institutions* (1992).
[37] 'Proprietorship' is defined as a 'sanctioned use right, including the right to decide whether to use the resource at all, determine the mode and extent of their use, and the right to benefit fully from the exploitation in the way they choose' (Murphree *Communities as Resource Management Institutions* (1992) 5).
[38] Murphree *Communities as Resource Management Institutions* (1992) 4-6.

For now, it is simply relevant to note that whilst the concept of 'the commons' remains somewhat ambiguous and its regulation subject to continued debate, shifting conservation paradigms in the past twenty years have significantly altered the path of these debates from the purely theoretical to the more practical. This dissertation seeks to focus on and solve but one small part of the broader common's puzzle, namely how to practically conserve common-pool natural resources situated in protected areas through effective communal property regimes. So what are these protected areas which some commentators regard 'as no more than another form of "commons" – areas set aside for a constituency which require protection through controls on their access and use'?[39]

3. PROTECTED AREAS

> 'To illustrate how difficult communication can be internationally, here is an example from outside of conservation. If you walk into a Starbucks in America and ask for a café grande, they will give you a medium-sized cup of coffee. If you ask for a café grande in Mexico, they may give you a bowl of coffee and a quizzical look. Ask for a café grande in Venice, and they will direct you to a shop on the Piazza Indipendenza. To understand parks and protected areas globally, we have to have a common language.'[40]

3.1 DEFINING PROTECTED AREAS

While the creation of a common language for variations in coffee servings has been significantly expedited through the proliferation of global coffee chains, the task of creating a common language for protected areas remains a vexed issue notwithstanding their existence as the foundation of the majority of national and international biodiversity conservation strategies.[41] Largely under the auspices of the

[39] Martin R "Murphree's Laws and Principles, Rule and Definitions' in Mukamuri et al *Beyond Proprietorship* (2009) 17.
[40] Mitchell B "'Who's Doing the Protecting in Protected Areas?' A Global Perspective on Protected Area Governance" 2007 24(3) *The George Wright Forum* 81.
[41] Dudley N (ed) *Guidelines for Applying Protected Area Management Categories* (2008) IUCN Gland 2.

IUCN, particularly its World Commission on Protected Areas (WCPA), and the United Nations Environmental Programme (UNEP), the past twenty years has seen the emergence of various global definitions for 'protected areas'. Based on the somewhat broad definition of protected area contained in the *Convention on Biological Diversity*,[42] the most contemporary version is reflected in the *IUCN Management Guidelines (2008)*,[43] which define a protected area as:

> '…a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'.[44]

Each of the elements of the above definition has in turn been defined and elaborated on in the above Guidelines.[45] It is not however the purpose of this dissertation to analyse the merits of the definition and each of its requirements, save to point out the following aspects. Whilst the definition encompasses *clearly defined geographical spaces* of land, inland water, coastal and marine areas, or a combination thereof - the scope of this dissertation is predominantly concerned with terrestrial protected areas. Whilst the definition is sufficiently broad to *recognise* a diversity of governance types including state governance, private governance, shared governance and governance by indigenous peoples and local communities – the scope of this enquiry is particularly concerned with the latter two forms of governance, those which can be facilitated through communal property regimes. Whilst the definition includes areas dedicated and managed through *legal or other effective means*, this enquiry focuses on those areas prescribed by and managed under statutory frameworks. Whilst the definition dictates that the areas should achieve *long-term conservation*, namely management in perpetuity, this enquiry includes an analysis of several arrangements that are not entirely perpetual in nature, but nonetheless constitute significant stepping stones towards long-term conservation. As will be subsequently argued in this dissertation, to

[42] 31 *ILM* 818 (1992). 'Protected area' is defined in article 2 of the *Convention* as a "geographically defined area which is designated or regulated and managed to achieve specific conservation objectives".
[43] Dudley *Guidelines for Applying Protected Area Management Categories* (2008).
[44] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 8.
[45] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 8-9.

apply this requirement of perpetuity strictly, would render the protected areas not only of South Africa, but many fellow Southern African nations, a fictional nullity.

Save for the above exceptions, the remaining elements of the definition are relied on for the purpose of this enquiry, specifically the *effective* in situ *conservation* of *nature* with *associated ecosystems services* (those related to but which do not interfere with the broad aim of nature conservation) and *cultural values* (similarly those which do not impact with the primary conservation outcomes).

3.2 MANAGEMENT CATEGORIES

Notwithstanding the apparent clarity of the above definition, the diversity of forms, designations and objectives associated protected areas across the globe is exceedingly diverse. Originating at the International Conference for the Protection of Flora and Fauna held in London in 1933, the international community has accordingly sought for approximately 80 years to develop a coherent terminology and typology - a common language - for describing, recognising and ultimately promoting an exceptionally diverse array of types protected areas.[46] This is reflected in the assorted array of Guidelines published predominantly under the auspices of the IUCN in the past 30 years,[47] which

[46] For a historical overview of the development of the *IUCN Management Guidelines* (2008) see: Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 3-5. See further: Bishop K, Dudley N, Phillips A & Stolton S *Speaking a Common Language - The Use and Performance of the IUCN System of Management Categories for Protected Areas* (2004) Cardiff University, IUCN & UNEP WCMC Cardiff.

[47] These guidelines include in chronological order: Lausche B *Guidelines for Protected Areas Legislation* (1980) IUCN & UNEP Gland; IUCN *Guidelines for Protected Areas Management Categories* (1994) IUCN Gland; Davey A *National System Planning for Protected Areas* (1998) Best Practice Protected Ares Guidelines Series No.1, IUCN Gland; World Commission on Protected Areas, *Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas* (1999) IUCN Gland; Beltran J *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (2000) Best Practice Protected Area Guidelines Series No.4, IUCN Gland; Phillips A (ed) *Financing Protected Areas - Guidelines for Protected Areas Managers* (2000) Best Practice Protected Area Guidelines Series No.5, IUCN Gland; Sandwith T, Shine C, Hamilton L & Sheppard D *Transboundary Protected Areas for Peace and Co-operation* (2001) Best Practice Protected Area Guidelines Series No.7, IUCN Gland; Eagles P, McCool S & Haynes C *Sustainable Tourism in Protected Areas - Guidelines for Planning and Management* (2002) Best Practise Protected Area Guidelines Series No.8, IUCN Gland; Phillips A *Management Guidelines for IUCN Category V Protected Areas, Protected Landscapes/Seascapes* (2002) Best Practice Protected Area Guidelines Series No.9, IUCN Gland; Thomas L & Middleton J *Guidelines for Management Planning of Protected Areas* (2003) Best Practice Protected Area Guidelines Series No.10, IUCN Gland; Borrini-Feyerabend G, Kothari A & Oviedo G *Indigenous and Local Communities and*

have cumulatively culminated in the recent publication of the *IUCN Management Guidelines (2008)*. Building on the original version developed by the IUCN in 1994,[48] the *IUCN Management Guidelines (2008)* expressly seek to standardise descriptions of protected areas and thereby: facilitate planning of protected areas and protected areas systems; improve information management about protected areas; and assist in regulating activities in protected areas.[49] Based predominantly on the main objectives for which protected areas are declared, the *IUCN Management Guidelines* (2008) distil the following six protected areas management categories:

- *Strict nature reserves* (Category Ia) - '…areas set aside to protect biodiversity and also possibly geologically/geomorphological features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of conservation values. Such protected areas can serve as indispensible reference areas for scientific research';[50]
- *Wilderness areas* (Category Ib) - '...usually large unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition';[51]
- *National parks* (Category II) - '...large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristics of the area, which also provide a foundation for

Protected Areas: Towards Equity and Enhanced Conservation - Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas (2004) Best Practice Protected Area Guidelines Series No.11, IUCN/Cardiff University Gland/Cambridge; Hamilton L & McMillan L *Guidelines for Planning and Managing Mountain Protected Areas* (2004) IUCN Gland; Dudley N & Phillips A *Forests and Protected Areas - Guidance on the Use of IUCN Protected Area Management Categories* (2006) Best Practice Protected Area Guidelines Series No.12, IUCN Gland; Emerton L, Bishop J & Thomas L *Sustainable Financing of Protected Areas: A Global Review of Challenges and Options* (2006) Best Practice Protected Area Guidelines Series No.13, IUCN Gland; Hockings M, Stolton S, Leverington F, Dudley N & Courrau J *Evaluating Effectiveness - A Framework for Assessing the Management of Protected Areas* (2nd Edition) (2006) Best Practice Protected Area Guidelines Series No.6, IUCN Gland; and Lockwood M, Worboys G & Kothari A (eds) *Managing Protected Areas: A Global Guide* (2006) Earthscan London.

[48] IUCN *Guidelines for Protected Areas Management Categories* (1994).

[49] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 6.

[50] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 13.

[51] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 14.

environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities';[52]

- *Natural monument or feature* (Category III) - '...set aside to protect a specific natural monument, which can be a landform, sea mount, submarine cavern, geological feature such as a cave or even a living feature such as an ancient grove. They are generally quite small protected areas and often have huge visitor value';[53]
- *Habitat/species management areas* (Category IV) - '...aim to protect particular species or habitats and management reflects this priority. Many category IV protected areas will need regular, active interventions to address the requirements of particular species or maintain habitats, but this is not a requirement';[54]
- *Protected landscapes/seascapes* (Category V) - '…where the interaction of people and nature over time has produced an area of distinct character with significant ecological, biological, cultural and scenic value; and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values';[55] and
- *Protected areas with sustainable use of natural resources* (Category VI) - 'conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area'.[56]

As evidenced by the above definitions, and specifically acknowledged in the *IUCN Management Guidelines (2008)* themselves, these management categories are largely neutral regarding who owns, controls or has the responsibility for managing protected

[52] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 16.
[53] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 17.
[54] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 19.
[55] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 20.
[56] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 22.

areas – issues of protected areas governance.[57] The management categories are accordingly largely irrelevant to this enquiry. However, as the issue of governance appears to lie at the heart of understanding how to practically conserve common-pool natural resources situated in protected areas through communal property regimes, it deserves comprehensive attention.

3.3 GOVERNANCE TYPES

As one commentator has recently noted, 'governance' has emerged as the new 'buzz word' of the 21st Century and appears to be regarded as a 'sort of magic wand' potentially applicable to a diversity of challenges and contexts.[58] So what is this notion of governance and why has it come to the fore in the context of protected areas?[59]

3.3.1 *'Governance' and 'Protected Areas Governance'*

Definitions of governance are plentiful and they appear to be as varied as the array of commentators responsible for their creation. These definitions include: 'the action or manner of governing or being governed';[60] 'the institutions, processes and traditions which determine how power is exercised, how decisions are taken and how citizens have their say';[61] 'the traditions and institutions by which authority in a country is exercised';[62] 'the use of institutions, structures of authority and even collaboration to

[57] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.
[58] Kotze L "Environmental Governance Perspectives on Compliance and Enforcement in South Africa" in Paterson A & Kotze L *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) Juta & Co Ltd Cape Town 104.
[59] Aspects of the following discussion of governance, protected areas governance and the critique of the IUCN protected areas governance contained in Chapter 2 (Parts 3.3-3.5) have been published in: Paterson A "Clearing or Clouding the Discourse: A South African Perspective on the Utility of the IUCN Protected Areas Governance Typology" (2010) 10(3) *South African Law Journal* 490-514.
[60] *The New Penguin English Dictionary* (2000).
[61] Johnson I *Redefining the Concept of Governance* (1997) CIDA Quebec 3. See further Graham J, Amos B & Plumptre T *Governance Principles for Protected Areas in the 21st Century* (2003) A Discussion Paper, Institute on Governance, Parks Canada & CIDA Ottawa. The latter authors define governance along very similar lines as '... the interactions among structures, processes, and traditions that determine direction, how that power is exercised, and how the views of citizens or stakeholders are considered by those making decisions' (at 2).
[62] World Bank *A Decade of Measuring the Quality of Governance: Governance Matters* (2007) World Bank Governance Indicators Project Washington 2.

allocate resources and coordinate or control activity in society or the economy';[63] 'the sum of the many ways individuals and institutions, public and private, manage their common affairs';[64] and 'the exercise of political, economic and administrative authority in the management of a country's affairs at all levels.'[65]

As is evident from the above definitions, the scope of governance is accordingly exceptionally broad. It is fundamentally concerned with the exercise of authority and specifically with who exercises such authority, how such authority is exercised, and the outcome of the exercise of such authority. The source of this authority can stem from statute, custom and tradition. The manner in which this authority is exercised can similarly be informed or circumscribed by statute, custom and tradition. Those empowered to exercise authority include international organisations, government institutions, non-government organisations (NGOs), community organisations and private citizens. The objects subject to the exercise of authority are varied, as are the desired outcomes that seek to satisfy social, economic, political and environmental agendas.

What is furthermore reflected in the above definitions of governance, is that it is inherently a neutral concept, fundamentally concerned with describing the types of 'complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations and mediate their differences'.[66] As such, it needs to be distinguished from its subjective counterpart, the notion of 'good governance', which is concerned with the quality of governance and specifically the prevalence of characteristics such as participation, transparency, accountability, rule of law, effectiveness and equity.[67] The importance of, commitment to

[63] Bell S *Economic Governance and Institutional Dynamics* (2002) Oxford University Press Melbourne.
[64] Curtin D & Dekker I "Good Governance: The Concept and its Application by the European Union" in Curtin D & Wessels R (eds) *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (2005) Intersentia Antwerp 5.
[65] United Nations Development Programme *Governance for Sustainable Human Development (2005)* UNDP Policy Paper.
[66] Ibid.
[67] Ibid. The United Nations Development Programme has gone as far as distilling the following nine characteristics of 'good governance': participation; rule of law; transparency; responsiveness; consensus orientation; equity; effectiveness and efficiency; accountability; and strategic vision.

and recent work[68] associated with fostering good governance within protected areas is simply acknowledged. It is addressed in more detail in Chapter 3. The principal concern here, is with the former objective component of governance, specifically the process by which institutions afforded authority in diverse contexts are established, exercise authority and held accountable for their actions, which should in turn lead to the attainment of good governance.

What is protected areas governance? According to Borrini-Feyerabend, it refers to 'who holds management authority and responsibility and can be held accountable according to legal, customary or otherwise legitimate rights'.[69] It is accordingly concerned with the interactions between the myriad of structures, processes, institutions and traditions that have a role to play in the formation and management of protected areas, how the power is allocated and exercised within the protected areas, and the manner in which those who exercise such power are held accountable.

If one surveys the scholarship on protected areas which has arisen during the course of particularly the past two decades,[70] one is immediately struck by the diversity of structures, processes, institutions and traditions at play and the variance in the quality and consistency of governance across and between them. Following a comprehensive review of trends in global protected area governance between 1992 and 2002, Dearden *et al* acknowledged this diversity and concluded that protected areas governance has

[68] See further on the notion of good governance and protected areas: Borrini-Feyerabend G *Implementing the CBD Programme of Work on Protected Areas - Governance as Key for Effective and Equitable Protected Area Systems* (2008) IUCN/CEESP Briefing Note 8, Cenesta Tehran 6-8; Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 28; Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 134-140; and Graham et al *Governance Principles for Protected Areas in the 21st Century* (2003) 7-10. See further the *Programme of Work on Protected Areas* (adopted at COP 7 of the *Convention on Biological Diversity* held in Kuala Lampur in 2004 and annexed to COP 7 Decision VII/28) which specifically requests parties to 'consider governance principles, such as the rule of law, decentralization, participatory decision-making mechanisms for accountability and equitable dispute resolution institutions and procedures' (Programme Element 1, Goal 3, para. 3.1.4).

[69] Borrini-Feyerabend G "Governance of Protected Areas, Participation and Equity" in *Biodiversity Issues for Consideration in the Planning, Establishment and Management of Protected Areas Sites and Networks* (2004) Convention on Biological Diversity Technical Series No.15, Secretariat of the Convention on Biological Diversity Montreal 100.

[70] For a comprehensive distillation and discussion of this literature, see Lockwood et al *Managing Protected Areas: A Global Guide* (2006).

no 'one best way'.[71] Borrini-Feyerabend *et al* have similarly concluded that governance is a 'complex and nuanced phenomenon that … [is] … not easy to circumscribe'.[72]

However, if one sifts through this diversity and complexity, there appear to be three broad issues which fundamentally shape protected areas governance and accordingly the rights/benefits and responsibilities/costs of those tasked with planning for, establishing, managing, regulating and financing protected areas.[73] The first relates to who holds tenure over the land situated within a protected area. This issue is in turn shaped by the following specific issues: the range of actors holding tenure (which can include national, provincial and local government institutions; NGOs; community organisations; juristic and natural persons); the form of tenure (which can include legal or formal tenure, customary tenure, common tenure; de jure and de facto tenure); and the content of the tenure (full ownership rights or more limited rights relating to development, use, access and/or occupation).[74]

The second broad issue relates to management and specifically who is responsible for managing a protected area, and the form and nature of such management. The actors at play here are as diverse as those listed above in the context of tenure and whilst they may be the same as those who hold tenure, this is not always the case. These actors may either undertake their role individually or in partnership with other actors through some form of co-management arrangement. The nature of the management rights and obligations is similarly varied and range from statutorily prescribed management schemes to those informed by customary laws and traditions. Finally, the actual nature of the management activities can include the preparation of management plans, the

[71] Dearden P, Bennett M & Johnston J "Trends in Global Protected Area Governance, 1992-2002" (2005) 36(1) *Environmental Management* 99.
[72] Borrini-Feyerabend G, Johnston J & Pansky D "Governance in Protected Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 117.
[73] These function are distilled from the five powers identified by Graham *et al*, namely: planning powers; regulatory (including law enforcement) powers; spending powers; revenue generating powers; and the power to enter into agreements to share or delegate such powers (Graham et al *Governance Principles for Protected Areas in the 21st Century* (2003) 13).
[74] For a general discussion of the varying form and content of rights and tenure that exists within protected areas, see: Wilkie D, Adams W & Redford K "Protected Areas, Ecological Scale, and Governance: A Framing Paper" in Redford K & Grippo C (eds) *Protected Areas, Governance and Scale* (2008) Wildlife Conservation Society New York 8-14.

prescription of rules, norms and standards, permitting schemes, environmental assessment and reporting.

The third broad issue is what I would call beneficiation, namely the range of rights/benefits and associated responsibilities/costs, which may flow from a protected area. As in the case of land tenure and management, two issues impact on the beneficiation component of protected areas governance: who has the rights/benefits and who bares the responsibilities/costs; and what is the basis or form of beneficiation. Regarding the former question, the rights/benefits and responsibilities/costs may fall on one or more person or institution, which could include: government authorities; community institutions; non-government organisations, companies; and ordinary people. Regarding the latter question, the rights/benefits and responsibilities/costs can be based in law, custom and agreement. The selection of the appropriate institution and form of beneficiation will largely depend on the capacity of key stakeholders.[75]

These issues of tenure, management and beneficiation in turn significantly influence the quality of governance in protected areas – inclusive of participation, transparency, accountability, rule of law, effectiveness and equity – commonly referred to as good governance. It is accordingly not surprising that having expressly reaffirmed the vital current and future role protected areas play in conserving the globe's biological diversity, those attending the Vth World Parks Congress held in Durban (South Africa) in 2003 identified governance as 'central to the conservation of protected areas throughout the world' and that 'success in the coming decade will depend in part on strengthening the governance of protected areas'.[76] It was at this Congress that an initial attempt was made to formulate a common language for understanding and describing the different forms of protected areas governance.[77] Four governance typologies were proposed (government; co-managed; private; and community

[75] These capacities could relate to a range of issues including: ownership (the capacity to fulfil the ownership function); management (the capacity to fulfil the management function); business (the capacity to regulate business relations); finance (the capacity to administer financial affairs); human resources (the capacity to manage staff); and strategic (the capacity to establish strategic partnerships).
[76] World Commission on Protected Areas *Durban Action Plan* (2003) IUCN Gland 257.
[77] Ibid.

conserved areas)[78] and the World Commission on Protected Areas was specifically mandated to include a governance dimension in the IUCN's protected areas management category system to reflect the plurality of protected area governance types accurately.[79] The past four Conference of Parties (COP) to the *Convention on Biological Diversity*[80] have further reiterated the need to improve and where necessary diversify and strengthen protected areas governance types, and for parties specifically to recognise the contribution of co-managed protected areas, private protected areas, and indigenous and local community conserved areas within the national protected area system.[81]

3.3.2 *Overview of the Current IUCN Governance Matrix*

This process culminated in the inclusion of four forms of governance in the *IUCN Management Guidelines (2008)*, the express purpose of which is to assist the international community and domestic policy-makers to understand, plan for and accurately record protected areas governance.[82] These forms largely mimic those proposed by Graham *et al* and Borrini-Feyerabend at the Vth World Parks Congress[83] and are: governance by government; shared governance; private governance; and governance by indigenous peoples and local communities.

[78] These four governance typologies were specifically based on the preparatory work of: Graham et al *Governance Principles for Protected Areas in the 21st Century* (2003); and Borrini-Feyerabend "Governance of Protected Areas, Participation and Equity" in *Biodiversity Issues for Consideration* (2004) 100-105.
[79] World Commission on Protected Areas *Durban Action Plan* (2003) IUCN Gland 258.
[80] 31 *ILM* 818 (1992).
[81] The importance of protected areas governance was affirmed in the *Programme of Work on Protected Areas* (adopted at COP 7 (Kuala Lumpur, 2004) and annexed to Decision VII/28) which emphasises the need to recognise and promote a broad set of protected area governance types, including areas conserved by indigenous and local communities and private nature reserves. See Programme Element 1 (Goal 1.1, para. 1.1.4) and Programme Element 2 (Goal 2.1: para. 2.1.2 and paras. 2.1.4-2.1.6; and Goal 2.2: paras. 2.2.1-2.2.2, paras. 2.2.4-2.2.5 and para. 2.2.7). See further: COP 10 (Nagoya, 2010) Decision X/31 (Protected Areas) para. 30-32; COP 9 (Bonn, 2008) Decision IX/18 (Protected Areas) para. 6a-6d; and COP 8 (Curitiba, 2006) Decision VIII/24 (Protected Areas) para. 18g.
[82] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 25. See further, Borrini-Feyerabend G *Implementing the CBD Programme of Work on Protected Areas - Governance as Key for Effective and Equitable Protected Area Systems* (2008) IUCN/CEESP Briefing Note 8, Cenesta Tehran 2-4.
[83] See note 76.

3.3.2.1 Governance by Government

This is the traditional form of protected areas governance whereby a government body, usually a government agency or statutory authority, 'holds the authority, responsibility, and accountability for managing the area', determining its conservation objectives, developing and enforcing its management plan.[84] The government body usually owns or holds in trust the land, water and resources situated in the protected area. It is generally held directly accountable to the Ministry providing for its appointment or designation. Consultation with relevant stakeholders regarding the establishment of the protected areas and its management is not the norm although even under this form of governance, public participation and accountability are apparently increasingly common and generally regarded as desirable. It is for this reason that even under this form of governance, provision for the delegation of planning or management functions to parastatals, NGOs, local communities, and or indigenous peoples is recognised. The ultimate authority however always vests in the government body. Owing to this diversity, three self-explanatory sub-categories are identified in the *IUCN Management Guidelines (2008)*, namely: national ministry or agency in charge; sub-national ministry or agency in charge; government-delegated management.

The nature and ambit of this form of governance is generally clearly defined and understood. However, one potential for confusion relates to the recognition that the government body may delegate various functions to an array of institutions including NGOs, local communities or indigenous peoples. Although it is anticipated that the government body retains the ultimate authority over the area, the provision for delegation may often practically result in the transfer of some authority to the latter institutions. Uncertainty may therefore arise regarding the point on the 'delegation continuum' at which the governance typology transcends into one of shared governance as opposed to governance by government.

[84] See further Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.

3.3.2.2 Shared Governance

In its simplest sense, shared governance involves governance by two or more actors.[85] Its practical manifestation is however far from simple, and involves the employment of far more diverse and 'complex institutional mechanisms and structures … to share management authority and responsibility among a plurality of (formally and informally) entitled governmental and non-governmental actors'.[86] The *IUCN Management Guidelines (2008)* seek to collapse this diversity under two main sub-categories, namely 'collaborative management' (also referred to as 'co-management') and 'joint management'. The former encapsulates the scenario where authority vests in one body (predominantly a government agency or statutory authority), but this body 'is required - by law or policy - to inform and consult other stakeholders'.[87] These stakeholders, traditionally limited to other relevant government agencies, have over time been extended to include local communities, indigenous peoples, NGOs, user associations, corporations, private landowners, or some combination thereof. The consultation process can be formalised through the establishment of multi-stakeholder bodies to assist in the formulation of management policies and proposals for consideration and adoption by the body formally appointed to manage the protected areas.

The latter, 'joint management' differs from 'collaborative management' in that decision-making authority vests in a range of bodies such as those identified above in the context of collaborative management. The decision-making process is varied and may or may not require consensus. Once a decision is made, its implementation is assigned or delegated to various agreed bodies or individuals.

While the above two sub-categories of shared governance reflect variations in the decision-making process, the *IUCN Management Guidelines (2008)* identify a third sub-

[85] See generally: Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26; Kothari A "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 528-548; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 32-50.
[86] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.
[87] Ibid.

category reflecting the geographical construct of 'collaborative management', namely 'transboundary management'. This involves protected areas which traverse international borders and which accordingly involve elaborate predominantly joint-management schemes involving one or more government bodies and other stakeholders. It falls under the broad realm of shared governance to the extent that it involves the conclusion of bilateral or regional agreements to harmonise management of two or more adjacent protected areas situated in different sovereign states.

What is somewhat confusing is how the above formulation of shared governance contained in the *IUCN Management Guidelines (2008)*, particularly the sub-categories of co-management and joint management, differ from the approach initially proposed in the *IUCN Guidelines on Indigenous and Local Communities and Protected Areas*[88] and which is reinforced in contemporary texts on collaboratively managed protected areas.[89] Both identify the following as common features of co-managed protected areas: arenas of social engagement, encounter and experimentation; capitalising on multiplicity, diversity and flexibility; based upon a negotiated, joint decision-making approach and some degree of power sharing; and promoting shared responsibilities and the equitable distribution of benefits.[90] The *IUCN Guidelines on Indigenous and Local Communities and Protected Areas* specifically define a co-managed protected area as a:

> '…government-designated protected area where decision making power, responsibility and accountability are shared between governmental agencies and other stakeholders, in particular indigenous peoples and local and mobile communities that depend on that area culturally and or for their livelihoods.'[91]

This formulation of co-management would appear to equate 'co-management' with the formulation of 'joint-management' as described under the *IUCN Management*

[88] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 32-50.
[89] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 528-529.
[90] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 38-39; and Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 528-529.
[91] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 32.

Guidelines (2008). Furthermore, the above definition of co-management is contained in a chapter titled 'Guidelines for Co-managed Protected Areas' that is in turn contained in the *IUCN Guidelines on Indigenous and Local Communities and Protected Areas*. Some contemporary commentators simply conflate the meaning of collaborative management, co-management, joint management and multi-stakeholder management.[92] The mixed use of terminology and the apparent lack of clarity regarding where to draw the line between shared governance and governance by indigenous peoples and local communities have potential for creating great confusion. It would appear to be diametrically opposed to one of the principal aims of creating governance typologies - the desire to create a common language for protected areas governance.

3.3.2.3 Private Governance

This form of governance has been introduced in order to recognise the growing number of protected areas largely voluntarily established by 'private' entities across the globe to promote conservation objectives.[93] These 'private protected areas', whilst often contributing to conservation, have frequently gone unnoticed and have accordingly often been omitted from recordal in the *World Directory of Protected Areas*.[94]

Private governance encapsulates protected areas owned or controlled by private entities including individuals, NGOs, corporations acting individually or collectively.[95] They are accordingly generally not subject to direct government authority. The *IUCN Management Guidelines (2008)* do however recognise that other entities, notably indigenous peoples and local communities, can also 'privately' own or control land situated in protected areas.[96] It may on occasion accordingly be difficult to distinguish

[92] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 528.
[93] See the sentiments reflected in the *CBD Programme of Work on Protected Areas* (adopted at COP 7 of the *Convention on Biological Diversity* held in Kuala Lampur in 2004 and annexed to COP 7 Decision VII/28) - specifically Programme Element 1 (Goal 1.1, para. 1.1.4) and Programme Element 2 (Goal 2.1, paras. 2.1.2-2.1.3; and Goal 2.2, para. 2.2.4 and para. 2.2.7).
[94] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 32.
[95] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.
[96] Ibid.

this form of governance from the fourth form of governance described below, namely governance by indigenous peoples and local communities.

The rationale for private entities establishing such areas range from generating profit (such as accruing eco-tourism revenue) to promoting purely philanthropic conservation interests. Within such areas, all decision-making authority relating to setting conservation objectives and developing and implementing management planning is generally statutorily vested in the private entity. However, the existence of a relevant statutory framework providing for the establishment, recognition and management of such areas, whilst desirable to ensure necessary accountability, is not a prerequisite. Incentives schemes (such as property tax and income tax benefits) frequently support the implementation of this form of governance. Three sub-categories are highlighted in the *IUCN Management Guidelines (2008)*, which are based upon whether the area is declared and run by: individual landowners; non-profit organisations (such as NGOs or universities); or by for-profit organisations (corporations or cooperatives).

There are a number of troubling aspects associated with this form of governance. Firstly, as mentioned above, it may be difficult to distinguish this form of governance from 'governance by indigenous peoples and local communities' as these peoples and communities can also operate in the private realm. Secondly, the *IUCN Management Guidelines (2008)* fail to properly reflect the diverse array of tenure options under which the land or natural resources may be held by 'private' landowners or the nuanced array of 'effective means' through which these areas may be managed. Thirdly, there may frequently be a degree of overlap between this form of governance and the former – namely shared governance – as private landowners may well enter into some form of collaborative or joint management scheme in order to share the management obligations and costs with government agencies and NGOs. Fourthly, the IUCN definition of protected areas provides that a protected area must be managed in perpetuity.[97] Private protected areas are frequently established for certain defined periods that can generally be extended with the agreement of the private entity holding

[97] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 8-9.

the land. While contributing significantly to conservation during their tenure, their temporary nature may well preclude them from being regarded, and accordingly recorded, as protected areas. Finally, unlike land owned or controlled by organisations, no distinction is made between whether individual landowners establish the protected area for profit or not-for profit motives. This is rather inconsistent.

3.3.2.4 Governance by Indigenous Peoples and Local Communities

It is this form of governance that has largely precipitated the increased focus on protected areas governance in recent times.[98] Some commentators have even labelled it as the 'most exciting conservation development of the 21st century'.[99] Having existed for hundreds or even thousands of years, its rise in prominence can partly be allied to the recognition of the rights of indigenous peoples and of local and mobile communities in several international instruments.[100] Notwithstanding its apparent prevalence, this often complex form of governance is perhaps the least understood.[101] There is however growing recognition that areas subject to this form of governance do contribute to biodiversity conservation, can fall within the bounds of the IUCN's definition of a protected area and should accordingly be the focus of significant future enquiry.[102] The most comprehensive outcomes of this relatively recent enquiry have been: the publication of the *IUCN Guidelines on Indigenous and Local Communities and Protected Areas*[103] and a range of *Briefing Notes* prepared under the auspices of the

[98] See generally: Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26 & 28-32; Kothari "Community Conserved Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 549-572; Kothari A "Community Conserved Areas: Towards Ecological and Livelihood Security" (2006) 16(1) *Parks* 3-13; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 51-81.

[99] Kothari "Community Conserved Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006) 549.

[100] These instruments include: *International Covenant on Economic, Social and Cultural Rights* (1976) 21 *ILM* 925; *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 *ILM* 1382; and most recently the United Nations *Declaration on the Rights of Indigenous Peoples* (2007) 46 *ILM* 1013. See further the following decisions of the CBD COP (COP 8 Decision VIII/24 (para. 18g) and COP 9 Decision IX/18 (para. 6)), which specifically recognised the value of this form of protected area governance.

[101] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 28.

[102] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 28-31. See further Kothari (2006) *Parks* 3.

[103] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas: Towards Equity and*

IUCN Commission on Environment, Economic and Social Policy (CEESP);[104] the formal establishment of the Indigenous and Community Conserved Areas (ICCA) Consortium in 2010;[105] and the commissioning of a range of studies to more fully understand the extent and nature of these protected areas.[106]

This form of governance has been defined as 'protected areas where the management authority and responsibility rest with indigenous peoples and/or local communities through various forms of customary or legal, formal or informal, institution and rules'.[107] The diversity of arrangements, institutions and areas that potentially fall under this exceedingly broad definition is vast and not necessarily static.[108] These areas range from those in which the land, water or resources are subject to collective and/or

Enhanced Conservation (2004).

[104] Borrini-Feyerabend G *Strengthening What Works - Recognising and Supporting the Conservation Achievements of Indigenous Peoples and Local Communities* (2010) IUCN/CEESP Briefing Note 10, Cenesta Tehran; Borrini-Feyerabend G (ed) *Bio-Cultural Diversity Conserved by Indigenous Peoples and Local Communities - Examples and Analysis* (2010) Report prepared by ICCA Consortium for GEF, SGP, GTZ, IIED and IUCN/CEESP; Borrini-Feyerabend G & Khotari A *Recognising and Supporting Indigenous and Community Conservation - Ideas & Experiences From the Grassroots* (2008) IUCN/CEESP Briefing Note 9, Cenesta Tehran; and Borrini-Feyerabend *Implementing the CBD Programme of Work on Protected Areas* (2008) 10-16.

[105] The ICCA Consortium, formally registered as a non-profit organisation in Switzerland in July 2010, comprises of a range of international non-government organisations which seek to accord appropriate recognition of ICCAs at national and international levels, and appropriate support to the indigenous peoples and local communities governing them. See further: http://www.iccaforum.org/.

[106] See for example: Khotari A, Menon M & O'Reilly S *Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs): How Far Do National Laws and Policies Recognise Them?* (2010) Preliminary Report dated October 2010, prepared for IUCN/CEESP, TILCEPA, WCPA and Kalpavriksh; and Blomley R, Nelson F, Martin A & Ngobo M *Community Conserved Areas: A Review of Status and Needs in Selected Countries of Central and Eastern Africa* (2007) Draft Report dated August 2007, prepared for TILCEPA, TGER, IUCN/CEESP, SwedBio & WCPA.

[107] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.

[108] For a comprehensive discussion of the nuanced governance types underpinning community conserved areas across the globe, see: Kothari et al *Territories and Areas Conserved by Indigenous Peoples and Local Communities*; Blomley et al *Community Conserved Areas: A Review of Status and Needs in Selected Countries of Central and Eastern Africa* (2007); Smyth D "Indigenous Protected Areas in Australia" (2006) 16(1) *Parks* 14-20; Rivera V, Cordero P, Borras M, Govan M & Varela V "Community Conservation Areas in Central America: Recognising them for Equity and Good Governance" (2006) 16(1) *Parks* 21-27; Bassi M "Community Conserved Areas in the Horn of Africa" (2006) 16(1) *Parks* 28-34; Brown J, Lyman M & Proctor A "Community Conserved Areas: Experience from North America" (2006) 16(1) *Parks* 35-42; Ferrari M "Rediscovering Community Conserved Areas in South-East Asia: Peoples; Initiative to Reverse Biodiversity Loss" (2006) 16(1) *Parks* 43-48; Pathak N "Community Conserved Areas in South Asia" (2006) 16(1) *Parks* 56-62; Holden P, Grossman D & Jones B "Community Conserved Areas in Some Southern African Countries" (2006) 16(1) *Parks* 68-73; Oviedo G *Lessons Learned in the Establishment and Management of Protected Areas by Indigenous and Local Communities in South America* (2003) WCPA Ecosystems, Protected Areas and People Project, IUCN Gland; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000).

individual tenure. The forms of tenure vary from full title to limited real rights afforded under customary law and/or statute. The land or resources in question may even be subject to government ownership but with management authority attributed down to one or more community. This management authority can similarly be founded in customary law and/or statute. The communities responsible for governing these areas can be sedentary and/or mobile and the boundaries of these areas fixed or flexible. There may accordingly be several communities exercising authority over an area or resource at any one time. The following three traits have however been identified as central to this form of governance: the relevant indigenous peoples or local communities are closely concerned with the preservation of the area (although the objective of such concern varies from strict conservation to sustainable use); they hold the main authority (stemming from varied sources including custom or statute) to make and implement decisions in respect of the area; and the exercise of such authority leads to or contributes to the sustainability of the area notwithstanding the fact that this need not necessarily have been the rationale for the action.[109]

To make some sense of this diversity, the *IUCN Management Guidelines (2008)* divide this form of governance into the following two sub-categories: l) indigenous or traditional peoples areas, and territories established and run by these peoples, and 2) community conserved areas established and run by local communities. The merit of drawing a distinction between 'indigenous peoples'[110] and 'local communities'[111] is not immediately

[109] See Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 51; and Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 29.

[110] 'Indigenous peoples' are defined in the *ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* (1989) as including: 'tribal peoples in indigenous countries whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (and) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonialisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions' (Article 1).

[111] 'Community' is defined by Borrini-Feyerabend et al as '... a human group sharing a territory and involved in different but related aspects of livelihoods – such as managing natural resources, producing knowledge and culture, and developing productive technologies and practices'; with 'local community' referring to those communities where members 'are likely to have *face-to-face* encounters and/or *direct* mutual influences in their daily life' (Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 9).

clear as the former are frequently regarded as the latter, and the latter the former, depending on where you are and to whom you talk.[112] This is expressly noted in the *IUCN Management Guidelines (2008)*[113] but the confusing terminology is nonetheless retained as part of an apparent compromise to accommodate the whims of all interest groups. Ironically, this form of governance is frequently conflated under terms such as indigenous community conserved areas (ICCAs) or simply 'community conserved areas'. As mentioned in the context of shared governance, this mixed use of nomenclature would similarly appear to undermine the desire to create a common language for describing, planning for and recording protected areas governance.

Confusing, further, is the potential of this type of governance to overlap with other types, most notably private governance and shared governance. How would one distinguish between a community conserved area and private governance where, for example, the community owns the land through an entity such as a trust or company (entities which are inherently private in nature) and exercises sole management authority over it? Furthermore, how would one distinguish between an indigenous people's protected area and co-management where, for example, several indigenous peoples or local communities residing within a given area collaborate in the management of it? Finally, how would one distinguish between governance by government and a community conserved area, where the area is state owned, and the state grants a lease to local community to use and manage the area on their behalf?

3.3.3 *Intersection of Governance Types and Management Categories*

Notwithstanding these anomalies, to the extent that the governance types reflected in *the IUCN Management Guidelines (2008)* promote the use and appreciation of a diverse array of governance types they should be welcomed. This is in keeping with the sentiments expressed at the 5th World Parks Congress where it was recognised that '…national protected area systems which combine different governance types are likely

[112] For a full discussion of the distinction between the definition of 'indigenous peoples' and 'local communities' see: Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 8-9.
[113] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 28.

to be more resilient, responsive and adaptive under various threats to conservation, and hence more sustainable and effective in the long run'.[114]

Significant thought has clearly gone into identifying and clarifying the differing forms of protected areas governance prior to and following the 5th World Parks Congress. This thought has been accompanied by an initiative to integrate the various forms of governance with the IUCN Management Categories for protected areas to create a so-called 'protected areas matrix' – a classification system for protected areas comprising both management category and management type. The outcome of this process is reflected in Figure 1 below.

Governance types / Protected area categories	A. Governance by government			B. Shared governance			C. Private governance			D. Governance by indigenous peoples and local communities	
	Federal or national ministry or agency in charge	Sub-national ministry or agency in charge	Government-delegated management (e.g., to an NGO)	Transboundary management	Collaborative management (various forms of pluralist influence)	Joint management (pluralist management board)	Declared and run by individual land-owners	... by non-profit organizations (e.g., NGOs, universities)	... by for-profit organizations (e.g., corporate owners, cooperatives)	Indigenous peoples' protected areas and territories – established and run by indigenous peoples	Community conserved areas – declared and run by local communities
Ia. Strict Nature Reserve											
Ib. Wilderness Area											
II. National Park											
III. Natural Monument											
IV. Habitat/ Species Management											
V. Protected Landscape/ Seascape											
VI. Protected Area with Sustainable Use of Natural Resources											

FIGURE 1: IUCN Protected Areas Matrix: A Classification System for Protected Areas Comprising both Management Category and Governance Type[115]

[114] 5th World Parks Congress (WPC. V.17).
[115] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 27.

The authors of the above IUCN Protected Areas Matrix acknowledge that it describes the different types of management authority and responsibility that can exist for protected areas, but only affords passing recognition to issues of land tenure.[116] However, is land tenure not an essential determinant of authority and warranting comprehensive reflection in the above matrix?[117] The authors appear to draw a distinction between ownership and governance stating that in 'some of the governance types … governance and ownership will often be the same'.[118] However, is ownership not an integral component or determinant of the form of governance and not something to juxtapose it against? The authors clearly seek to afford recognition to a diversity of governance options (four main types and several sub-categories thereof). However, are these governance options sufficiently broad to capture such diversity accurately, or will the attempt to straightjacket them into four main categories ultimately confuse, undermine and lead to the inaccurate recordal of such diversity. As identified by several commentators, governance options effectively exist on a continuum with formal government controlled protected areas existing on the extreme and informal communally-conserved areas on the other.[119] Is it therefore wise to attempt to box governance types strictly within four main typologies when protected areas governance appears to be frightfully nuanced and frequently traverses the boxes? The practical implementation of this approach may prove problematic given the apparent inherent anomalies plaguing the current protected areas governance types and *IUCN Protected Areas Matrix* promoted by the IUCN.

[116] Ibid. This is similarly reflected in Graham et al *Governance Principles for Protected Areas in the 21st Century* (2003) 15. This latter document was fundamental in informing the development of the protected areas governance types included in the *IUCN Management Guidelines (2008)*.
[117] According to Mitchell, '… ownership models (have) particular implications for management' (Mitchell (2007) *The George Wright Forum* 85).
[118] Mitchell (2007) *The George Wright Forum* 85.
[119] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (2004) 30. See further the similar governance continuum proposed by Dearden et al ranging from full agency (or state) control to full control by others (Dearden et al (2005) *Environmental Management* 93).

3.3.4 *Critique of the IUCN Governance Matrix*

On a precursory first reading, the governance types reflected in the *IUCN Protected Areas Matrix* contained in the *IUCN Management Guidelines (2008)* provide a vital step toward developing a 'common language' for understanding the myriad protected areas governance options adopted across the globe – including those subject to communal property regimes. However, as can hopefully be ascertained from the above review, there are four main issues that may well undermine their utility as a tool for understanding, planning for and recording protected area.[120]

The first is *confusing terminology*. Distinguishing co-management from joint management from collaborative management is not an easy task given the disparate meanings accorded to these terms by several preceding IUCN guideline documents. Similarly, the distinction, and rationale underlying the distinction, between indigenous peoples and local communities; and for that matter between indigenous community conserved areas and community conserved areas, is not immediately apparent.

The second is *misconceiving governance*. As is argued above, there appear to be three fundamental elements impacting on protected areas governance, namely issues of tenure (who holds the land); issues of management (who manages the land); and issues of beneficiation (who holds the rights/benefits and is accountable for the responsibilities/costs associated with the land and resources situated within the protected area). The governance types reflected in the *IUCN Management Guidelines (2008)* largely ignore the first and last of these issues, therefore potentially providing a very skewed viewed of the authority and dynamics at play in protected areas. The apparent indifference shown to these other key components of governance may well come to haunt their practical application and utility. This is especially relevant in the context of communal property situated within protected areas.

[120] For a full discussion of these issues from a South African perspective, see: Paterson (2010) *South African Law Journal* 490-514.

The third may be described as *fudging the divides*. As I have illustrated in the above discussion, and as is partially acknowledged in the *IUCN Management Guidelines (2008)* themselves, there is significant overlap in the proposed governance types. As I have argued above, it may, for example, be difficult to distinguish governance by government from shared governance where the government authority elects to delegate certain management functions to an NGO, individual or local community. It may similarly be difficult to distinguish shared governance from governance by indigenous and local communities where several distinct community organisations seek to collaborate in the management of a certain area. The design of the *IUCN Protected Areas Matrix* appears to anticipate that the form of governance for each protected area can neatly fall within one of eleven governance sub-categories identified by its authors. It is in fact proposed that the governance type of each protected area should be identified, along the lines of the proposed categories, and recorded in the relevant national and international protected areas databases.[121] However, on many occasions there will frequently be more than one type of governance at play within a particular protected area. It is accordingly perhaps unworkable, unwise and unhelpful to try and squash protected areas governance into certain predefined and exclusive governance categories.

The fourth I would call *clouding description and prescription*. It must be remembered that it is currently the protected areas management categories contained in the *IUCN Management Guidelines (2008)*, and not the governance categories contained therein, which act as the screen for determining whether a protected area is worthy of global recordal and recognition. The issue of governance is therefore more descriptive than prescriptive, something partially recognised in the *IUCN Management Guidelines (2008)* themselves. They state that 'management objectives for the categories can be developed and assigned without regard for governance' and that the listing of governance type in World Database on Protected Areas is largely about enhancing an understanding of, comparison between and ultimate improving the effectiveness of protected areas.[122] Is it not unwise to include descriptive elements and prescriptive

[121] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 27.
[122] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 28.

elements within one matrix and to require countries to identify and record the governance type in relevant national and international protected areas databases? It holds significant potential for prescriptive elements to be confused with descriptive elements. Perhaps for this reason alone, the current formulation and integration of governance types within the *IUCN Management Guidelines (2008)* (particularly within the *IUCN Protected Areas Matrix*) should be reconsidered, to avoid their unwarranted rise to a global prescriptive requirement for affording formal recognition to protected areas.

Given their overlapping nature, confused use of terminology, narrow formulation of governance and potential to cloud the distinction between prescriptive management categories and descriptive governance types, the value of the current governance typology and matrix as tools for understanding, planning for and accurately recording protected areas must be questioned. Developing typologies, matrices and check boxes do have their value in many contexts. However, perhaps it is too early to do so in the context of protected areas governance given the diversity, complexity and relative novelty of the discipline. I do not wish to underscore the value of the significant scholarly work that has gone into distilling many essential elements or characteristics of relevance to protected areas governance over the past decade.[123] The packaging of these elements is simply problematic as are the efforts to compress an unruly concept in certain prescribed boxes. This makes it difficult to adopt the four defined governance types contained in the *IUCN Management Guidelines (2008)* for the remainder of this dissertation. However, as previously mentioned, the issue of governance is central to understanding, planning for and recording the rise of communal property regimes as

[123] This scholarly work would include: Abrams P, Borrini-Feyerabend G, Gardner J & Heylings P *Evaluating Governance: A Handbook to Accompany A Participatory Process for A Protected Areas* (2003) Draft Report for field testing dated July 2003, prepared for Parks Canada and TILCEPA; Graham et al *Governance Principles for Protected Areas in the 21st Century* (2003); Borrini-Feyerabend "Governance of Protected Areas, Participation and Equity" in *Biodiversity Issues for Consideration* (2004); Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004); Wilkie et al "Protected Areas" in *Protected Areas, Governance and Scale* (2008); Goriup (ed) 'Community Conserved Areas' (2006) 16(1) Special Edition of *Parks: International Journal for Protected Areas Managers*; Borrini-Feyerabend et al "Governance in Protected Areas" in *Managing Protected Areas: A Global Guide* (2006); Kothari "Collaboratively Managed Protected Areas" and "Community Conserved Areas" in Lockwood et al *Managing Protected Areas: A Global Guide* (2006); and Dudley *Guidelines for Applying Protected Area Management Categories* (2008).

tools for facilitating common-pool natural resource management within statutorily prescribed protected areas. So what would be an alternative and desirable approach for considering the issue of protected areas governance in general and in the context of those founded on communal property regimes? How can one move towards an approach which more accurately describes and records the rich diversity of governance options which have been used and/or could be used to foster communal property regimes within protected areas - rather than one which seeks to squash this rich diversity into somewhat unruly boxes for the purpose of analysis and reporting?

3.3.5. *Towards a Different Approach to Protected Areas Governance*

The first step is to develop a proper understanding of protected areas governance. As mentioned above, there are three fundamental issues that appear to underlie the source, allocation and exercise of authority within a protected area.[124] First, who owns or holds rights in the land and resources situated within a protected area – a question of land tenure. Secondly, who has the authority to manage the land and resources situated within a protected area - a question of land management. Thirdly, who holds the rights/benefits and is accountable for the responsibilities/costs associated with the land and resources situated within the protected area – a question of beneficiation. In respect of each of these components, two further issues require attention – the questions *who holds the rights and/or authority*; and *what the basis and form of such rights and/or authority is*.

If one considers these latter two questions in the context of the land tenure component of governance, the land and/or natural resources falling within the protected areas could be owned and/or held by one or more entities. These entities could include the government, communities (acting through communal property associations, trusts and similar structures) and individuals (comprising of natural and juristic persons, including NGOs). The form of tenure could include legal or formal tenure, customary tenure, common tenure, de jure and de facto tenure. Finally, the content of such tenure could

[124] See Chapter 2 (Part 3.3.1).

comprise of full ownership rights or more limited rights relating to development, use, access and/or occupation.

In the context of the land management component of governance, the protected area could similarly be managed by one or more entities. The array of entities responsible for management and the source/basis for the management authority are as identified above in the context of the land tenure component of governance. However, where one is dealing with multiple entity management, a further distinction could be drawn between co-management, joint management and transboundary management (as defined in *IUCN Management Guidelines (2008)*). The basis of management could be founded in statute, customary law or even contract, where for example management contracts or concessionary agreements are entered into between the entity which holds tenure rights and a third party.

In the context of the beneficiation component of governance, the rights/benefits and responsibilities/costs could once again fall to one or more entities of the variety listed above. The basis of beneficiation could be founded in statute, customary law or even contract. The nature of the rights/benefits and responsibilities/costs are very diverse and will vary in each situation. Relevant rights/benefits could include:[125]

- *Decision-Making Rights* - the right to make decisions regarding the protected area and the resources located within it.
- *Access Rights* - the right to access the protected area for non-consumptive purposes (for cultural/spiritual/recreational purposes).
- *Occupation Rights* - the right to reside within the protected area.
- *Resource Use Rights* - the right to harvest and use resources in the protected area.
- *Commercial Rights* - the right to develop certain parts of the protected area for commercial gain.

[125] This list is adapted and expanded from the list of rights/benefits espoused by De Koning (De Koning M "Co-Management in Protected Areas" (2010) *Presentation & Document Prepared for the People & Parks Steering Committee* 43-45.

- *Equity Rights* - the right to share in financial benefits associated with commercial activities undertaken in the protected area.
- *Lease Benefits* - financial benefits that arise from the lease of land in the protected area to the government or to private companies (in terms of concession agreements).
- *Employment Benefits* - benefits that arise from employment in the protected area.
- *Grant benefits* - benefits that arise through access to government grants.
- *Tax Benefits* - tax incentives which accrue to people who contract their land into a protected area, assist in managing the protected area or who donate land or money to the protected area.
- *Climate change benefits* - benefits that could accrue through climate change incentive schemes relating predominantly to mitigation projects undertaken in the protected area.

Relevant responsibilities/costs could in turn include those related to:[126]

- *Ownership* - the responsibilities/costs associated with ownership and compliance with general environmental legal obligations.[127]
- *Management* - the responsibilities/costs associated with managing the protected area.[128]
- *Development* - the responsibilities/costs associated with tourism developments undertaken within the park.[129]

[126] This list is similarly adapted and expanded from the list of responsibilities/costs espoused by De Koning (De Koning "Co-Management in Protected Areas" (2010) 43-45).
[127] The responsibilities/costs associated with ownership could include: payment of relevant rates and taxes; fencing the land; regulating access to the land; undertaking alien-invasive clearing; preventing and managing veld fires; conserving natural resources; and preventing general pollution and degradation.
[128] The responsibilities/costs associated with management could include: financing management costs; preparing management plans; implementing the management plan; employing and managing staff; maintaining infrastructure (roads; fences, watering holes; staff houses; etc.); and research, monitoring and reporting.
[129] The responsibilities/costs associated with development could include: providing and/or sourcing capital to undertake the development; entering into contractual arrangements with service providers; managing the relationship with and performance of service providers; employing and managing staff to construct, operate or manage the development; ensuring compliance with environmental legal obligations (planning permission, EIA authorisation, other authorisations); and maintaining tourism infrastructure.

The above understanding of protected areas governance and the main issues that inform its practical manifestation are depicted in the Figure 2 below.

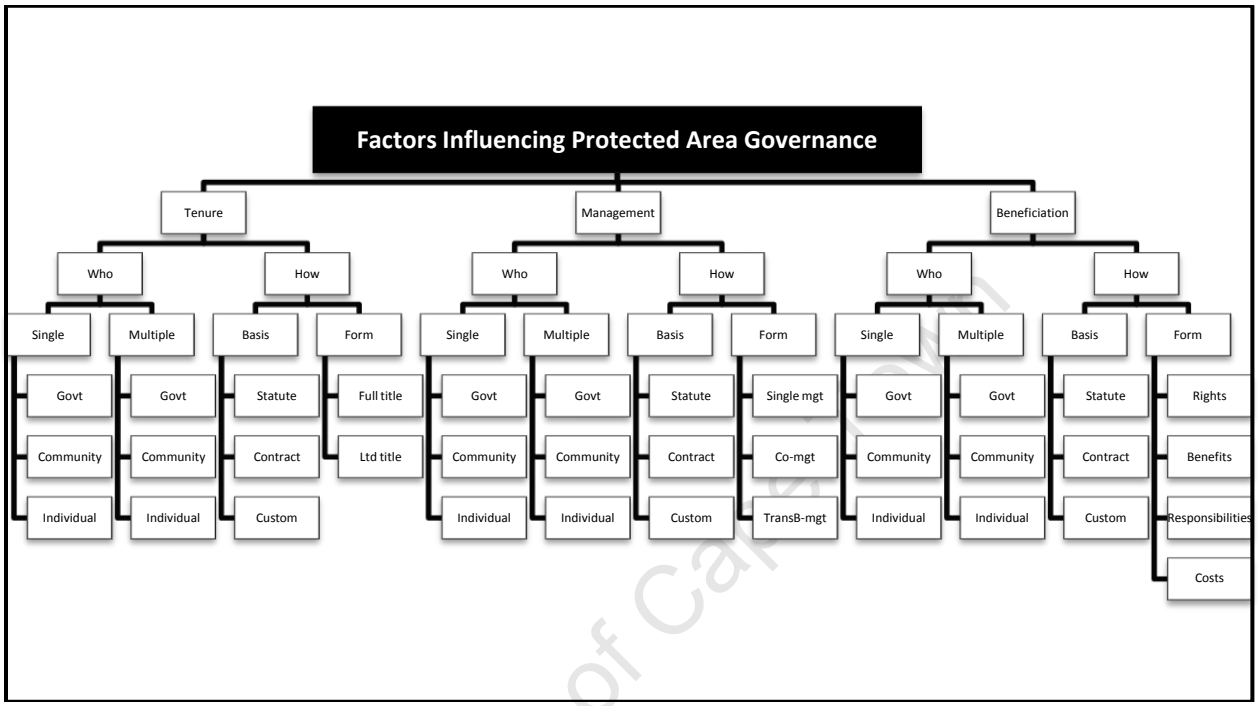

FIGURE 2 – Factors Influencing Protected Areas Governance

It is argued that the above approach which seeks to extract and focus on the essential elements impacting on protected areas governance could facilitate a better understanding of governance options prevalent in existing protected areas, and the myriad of alternatives available to those seeking to establish and/or afford formal recognition to new areas held under nuanced forms of propriety rights and subject to varied forms of management and beneficiation regimes.

This is, however, but the first step in the process. The second is the need to move away from what could be called the 'squash into a box' approach adopted in the *IUCN Management Guidelines (2008)*. As mentioned above, there will be many instances where it will not be possible to compress the form of governance prevalent in a

protected area neatly into one box on a matrix.[130] Nor would this tell one much about the many distinct elements impacting on the governance of that protected area, such as those reflected in Figure 2 above. Therefore, one needs to adopt a different approach to understanding, planning for and ultimately recording protected areas governance, one which is less prescriptive (where one is compelled to tick a single box in a matrix of options) and more descriptive (where one can tick a range of boxes which seek to reflect the essential components underlying the practical manifestation of governance within a particular protected area). Figure 2 could over time be elaborated and developed into a separate descriptive matrix containing check boxes next to each element – enabling domestic conservation authorities to record (tick) accurately which governance elements are present in a particular protected area.

Some may argue that the above approach to describing, planning for and recording protected areas governance is far more complex than that adopted in the *IUCN Management Guidelines (2008)* and may accordingly lead to confusion. However, protected areas governance is complex. We should not seek to conceal this complexity by squeezing protected areas governance into a few boxes. We should rather seek to embrace its glorious diversity and promote the creativity shown by numerous jurisdictions in affording recognition to previously marginalised areas. Through this process that we can seek to understand protected areas governance and promote the adoption of a blend of its components that may lead to the attainment of the ideal of good governance within a particular protected area.

It is this more descriptive approach to protected areas governance that I adopt in this enquiry. Rather than blindly relying on and applying the protected areas governance types and *IUCN Protected Areas Matrix* reflected in the *IUCN Management Guidelines (2008)*, I seek to understand the elements of governance at play when evaluating existing statutory protected areas subject to communal property regimes and seeking to plot their way forward in South Africa. This venture is informed by the significant research undertaken by protected areas governance scholars during the last decade.

[130] See the critique undertaken in Chapter 2 (Part 3.3.4).

4. CONCLUSION

This chapter has traversed two broad contextual and largely theoretical issues relating to protected areas founded on communal property regimes, namely: the *objective* of the CCAs – managing the natural commons; and the general *form* of CCAs – a protected area.

Regarding their object, I sought to highlight how the meaning of the natural commons remains troubled but is integrally connected to issues of property rights and land tenure. I emphasised how the failure by traditional scholars of the 'commons' to draw clear distinctions between the nature of the resource system and the nature of the property rights applicable to it, has been manipulated in the past to promote global political agendas. I underlined how prior regimes have, through privatisation and state control, sought to entrench exclusionary, protectionist and state-centred approaches to conservation in areas previously subject to effective communal property regimes. I furthermore stressed the need to recognise these communal property regimes, not as a relationship between man and thing, but rather as a social relation. I concluded by highlighting that although the concept of 'the commons' remains somewhat ambiguous and its regulation subject to continued debate, shifting conservation paradigms in the past twenty years have significantly altered the path of these debates which now largely focus on identifying necessary prerequisites for implementing effective communal property regimes aimed at conserving common-pool natural resources. It is this aspect of the broader commons puzzle and its relationship to protected areas, specifically terrestrial and statutory prescribed protected areas subject to communal property regimes, which form the focus of further enquiry.

Regarding their form, I traversed the array of recent efforts to improve the understanding, planning for and recording of the diversity of protected areas that exist across the globe. I illustrated how the management categories contained in the *IUCN Management Guidelines (2008)*, with their apparent aversion to issues of governance,

are largely superfluous to the main enquiry. I furthermore sought to demonstrate that notwithstanding the importance of governance to the current enquiry, the governance types contained in the *IUCN Management Guidelines (2008)* are somewhat problematic due to their overlapping nature, confused use of terminology, rather narrow formulation of governance and potential to cloud the distinction between prescriptive management categories and descriptive governance types. As previously mentioned, significant work has gone into distilling many essential elements or characteristics of relevance to protected areas governance during the past decade. In this dissertation, I hope to contribute to the continuing investigation by scrutinising the packaging of these elements under four predefined governance types. To overcome 'packaging' problems, I accordingly proposed a revised approach to understanding the key issue of protected areas governance, one that seeks to identify the elements underpinning protected areas governance, rather than uncomfortably delimit governance types within pre-labelled boxes.

In sum, the rationale for having undertaken the above analysis is three-fold. Firstly, it intends to circumscribe the meaning of several very anomalous terms of relevance to this enquiry, namely: the commons; common pool resources; communal property; protected areas; governance; and protected areas governance. Secondly, the analysis aims to clearly delimit the ambit of the general enquiry to terrestrial and statutory prescribed protected areas subject to communal property regimes. Thirdly, it hopes to provide the necessary context for the subsequent theoretical analysis on CCAs. It is to this latter analysis that I now turn.

CHAPTER 3

THE NATURE, FORM AND FACTORS INFLUENCING COMMUNALLY-CONSERVED AREAS

1. INTRODUCTION

Having criticised the underlying protected areas governance paradigm owing to the overlapping nature of its typology, confused use of terminology, narrow formulation of governance and potential to cloud the distinction between prescriptive management categories and descriptive governance types in the previous chapter, it would be imprudent to use its terminology. Furthermore, having criticised the underlying governance paradigm and its associated terminology, new terminology can be introduced. In particular, the proposed concept of 'communally-conserved areas' (CCAs) may aid in transcending the anomalies associated with the previous terminology and provide a more workable lens through which to describe, plan for and evaluate the exceedingly diverse efforts to conserve common-pool natural resources through communal property regimes.

I now turn to questions such as the meaning of 'communally-conserved areas'; how this concept differs from or relates to previously defined forms of governance; how significant shifts in economic, property rights, ecology, human rights and conservation discourses have contributed to their rise in prominence in the past decade; and finally, what general elements are relevant to their successful implementation?

2. DEFINITIONAL ISSUES

Prior to formulating a new definition, it is necessary to understand certain key concepts underlying its formulation. The majority of these concepts have been specifically

canvassed in Chapter 2 including: 'commons'; 'common-pool resources'; 'common property'; 'communal property'; 'private property'; 'state property'; 'open-access regimes'; 'protected areas'; 'governance'; 'protected areas governance'; 'governance by government'; 'private governance'; 'shared governance'; 'governance by indigenous peoples and local communities'; 'indigenous peoples areas'; 'community conserved areas'; 'co-managed areas'; and 'collaboratively managed protected areas'. These concepts do not need to be repeated here. There is however one broad concept which does require further attention, the notion of 'communal' or 'communally', as it underpins the subsequent definition of 'communally-conserved area'.

'Communally' is defined as '... shared or used in common by members of a group or community'.[1] It is an exceedingly broad concept. It does not delimit the nature or scope of the object subject to the sharing or use. It does not delimit the proprietary regime governing the object subject to the sharing or use. It does not delimit the management institutions or rules that inform the sharing or use. It does not delimit the specific purpose or objective of such sharing or use save in two respects. First, the nature of such sharing or use must be 'in common' – 'belonging to or shared by two or more individuals or by all members of a group' and/or shared or used for the benefit 'of the community at large'.[2] Secondly, the common sharing or use must be by 'members of a group or community'.[3] Importantly, the concept clearly recognises sharing and use as integral components.

The notion of a CCA logically inherits such traits. It encompasses protected areas established to conserve a broad array of common-pool natural resources (objects) including those situated in the terrestrial and marine context. It encompasses protected areas subject to a diverse array of proprietary regimes, both in respect to the form of tenure (custom, statutory, contractual, de facto) and nature of that tenure (full ownership

[1] Allen R (ed) *The New Penguin English Dictionary* (2000) Penguin Books Ltd 278.
[2] Allen *The New Penguin English Dictionary* (2000) 277. See definition of 'common'.
[3] 'Group' is defined as '…a number of people or things gathered together or regarded as forming a single unit…' (Ibid 617). 'Community' is defined as '…(a) a group of people living in a particular area; (b) all the interacting populations of various living organisms in a particular areas; (c) a group of individuals with some common characteristic … (d) a body of people or nations having a common history or common interest…' (Allen *The New Penguin English Dictionary* (2000) 278).

rights or more limited rights relating to development, use, access and/or occupation). It encompasses protected areas subject to a diverse range of management institutions and rules both in respect of the basis of such management (custom, statutory, contractual, de facto) and the form of management (including co-management; joint management and transboundary management). It encompasses protected areas falling within the majority of the IUCN Management categories given the broad objects underlying their creation (save for those in which some form of communal access and use are precluded). The protected area must, however, be communal in nature to the extent that it (the land and the common-pool natural resources situated within its borders) must belong to or be shared by members of a 'group' or 'community', terms which themselves are broadly defined and would include indigenous peoples[4] and local communities.[5]

Being founded on the essential elements of governance that afford the area its communal nature – issues of tenure and management – the concept of a CCA traverses the artificial and anomalous divides created by the IUCN governance typology. It clearly includes various governance types identified in the *IUCN Management Guidelines (2008)*, namely governance by indigenous peoples and local communities and shared governance. It however excludes others, namely governance by government and private governance, due to their non-communal nature. Therefore, based on the IUCN's

[4] 'Indigenous peoples' is defined in the *ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* (1989) 28 *ILM* 1382 as including: 'tribal peoples in indigenous countries whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (and) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonialisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions' (Article 1).

[5] 'Community' is defined by Borrini-Feyerabend *et al* as 'a human group sharing a territory and involved in different but related aspects of livelihoods - such as managing natural resources, producing knowledge and culture, and developing productive technologies and practices'; with 'local community' referring to those communities where members 'are likely to have *face-to-face* encounters and/or *direct* mutual influences in their daily life' (Borrini-Feyerabend G, Kothari A & Oviedo G *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation - Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas* (2004) Best Practice Protected Area Guidelines Series No.11, IUCN/Cardiff University Gland/Cambridge 9).

most contemporary definition of protected areas,[6] and drawing from contemporary definitions of those governance types feasibly falling within its ambit, a CCA could be defined as:

> 'a clearly defined geographical space, established, recognised, used and managed by indigenous peoples and local communities, themselves or in partnership with others, through legal or other effective means, to commonly achieve the enduring conservation of nature with associated ecosystem services and cultural values'.

It is this definition of CCA on which I shall rely for the remainder of this dissertation. I have purposely omitted two words from the general IUCN definition of 'protected area', namely 'dedicated' and 'long-term'. The former is superfluous as the sentiments associated with its inclusion can be inferred from other words such as 'recognised' and 'to...achieve'. I have omitted the latter owing to its association in the *IUCN Management Guidelines (2008)* with notions of perpetuity[7] that, as I have previously mentioned, would render a significant portion of the established protected areas in South and Southern Africa a fictional nullity. I have accordingly replaced the word 'long-term' with 'enduring' – affording the latter its ordinary meaning, 'lasting or durable',[8] as opposed to perpetual. I have inserted the wording '... by indigenous peoples and local communities, themselves or in partnership with others ... to commonly...' - to afford necessary recognition to their communal nature. I wish to reiterate that I do not seek to grapple here with all forms of CCAs falling under this definition, only those prescribed by statute and situated in the terrestrial environment.

Receiving little attention some twenty years ago, CCAs are now the centre of protected areas scholars' attention. Why is this so? The answer lies in shifting discourses prevalent in the scholarship of economists, property right theorists, human rights advocates, ecologists and conservationists.

[6] Dudley N (ed) *Guidelines for Applying Protected Area Management Categories* (2008) IUCN Gland 8.
[7] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 9.
[8] Allen *The New Penguin English Dictionary* (2000) 460.

3. IDEOLOGICAL SHIFTS WHICH HAVE FACILITATED THE RISE OF COMMUNALLY-CONSERVED AREAS

As with the landscapes, ecosystems and species CCAs seek protect, the ideologies informing their protection, management and regulation are in a constant state of flux. The past two decades have witnessed, in the words of one commentator, a 'tectonic shift' from the conventional protectionist, exclusionary, state-centred approach to conservation towards a more inclusive, participatory, human-centred approach to conservation.[9] Prior to grappling with the nature of this tectonic shift in any detail, and its practical manifestation through CCAs, it would appear prudent to reflect briefly on several relevant and related trends arising from several scholarly discourses that have contributed to it. These trends, several of which are now concretised in international instruments, are: the rise of indigenous peoples' tenure and resource rights within the human rights discourse; the acknowledgment of sustainable use, access and benefit-sharing imperatives within the conservation discourse; the recognition of systems-thinking, adaptive management and participatory management within the ecological discourse; the acceptance of communal property regimes as effective forms of tenure for managing the common-pool natural resources within the economic and property rights discourse; and finally, the appreciation of the diversity of protected areas governance within the protected areas discourse.

[9] Sanderson S & Bird S "The New Politics of Protected Areas" in Brandon K, Redford K & Sanderson S *Parks in Peril* (1998) The Nature Conservancy, Island Press Washington DC 441. See further: Nelson F & Agrawal A "Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa" (2008) 39(4) *Development and Change* 557-585; Khotari A, Balasinorwala T, Jaireth H & Rahimzadeh A "Local Voices in Global Discussions: How Far Have International Conservation Policy and Practice Integrated Indigenous Peoples and Local Communities" (2008) Unpublished paper presented at Symposium on Sustaining Cultural and Biological Diversity in a Rapidly Changing World: Lessons for Global Policy, American Museum of Natural History, New York (April 2008) 1-3; and Brown K "Three Challenges for a Real People-Centred Conservation" (2003) 2 *Global Ecology & Biogeography* 89-92.

3.1 TRENDS CONTRIBUTING TO THE 'TECTONIC SHIFT'

3.1.1 *Rise of Indigenous Peoples' Tenure and Resource Rights*

The human rights discourse has had a significant influence on the conservation discourse through affording recognition to indigenous peoples' tenure and resource rights. No longer can indigenous peoples be treated as the scourge of conservation; weak yet irritating and unnecessary annoyances able to be forcibly moved, constrained, silenced, or simply ignored in the interest of conservation.

Finding its origins in the mid-twentieth Century following the end of World War 2, and first acknowledged in international human rights instruments such as *Universal Declaration on Human Rights* (1948) and the *International Covenant on Economic, Social and Cultural Rights* (1966),[10] indigenous peoples and local communities had to wait some forty years for the first comprehensive global expression of their rights – in the form of the *ILO Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989).[11] Many of rights contained in the *ILO Convention* have subsequently been duplicated in the recent *United Nations Declaration on the Rights of Indigenous Peoples* (2007).[12] These rights include the right of indigenous peoples: to 'freely determine their political status and pursue their economic, social and cultural

[10] The role of regional instruments such as the *American Declaration on the Rights and Duties of Man* (1948) and the *American Convention on Human Rights* (1969) in raising the international profile of indigenous peoples' rights over land and natural resources is acknowledged. However, a full discussion of the numerous relevant policy documents emanating from the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights falls outside the purview of this dissertation. See further in this regard: Inter-American Commission on Human Rights *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources - Norms and Jurisprudence of the Inter-American Human Rights System* (2009) OEA/Ser.L/V/ii.Doc.56/09.

[11] *The ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* (1989) specifically recognises their rights: to have their social, cultural, religious and spiritual values and practices recognised and protected (Article 5); to be consulted with and participate in decisions which may directly affect them (Article 6); to define their development priorities (Article 7); to own or possession land traditionally occupied by them (Article 14); to participate in the use, management and conservation of renewable and non-renewable natural resources (Article 15); and crucially not to be removed from the lands that they occupy and, if this is necessary as an exceptional measure, to relocate them only with their free and informed consent and with an assured right of return and proper compensation (Article 16).

[12] (2007) 46 *ILM* 1013. For a comprehensive analysis of the history and content of this *Declaration*, see: Allen S & Xanthaki A (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011) Hart Publishing Ltd Oxford.

development';[13] not to be forcibly removed from their lands and not to be relocated 'without their free, prior and informed consent' and only 'after agreement on just and fair compensation and, where possible, with the option of return';[14] 'to participate in decision-making in matters which would affect their rights';[15] 'to maintain and strengthen their distinctive spiritual relationship with their traditionally-owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources';[16] 'to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired';[17] 'to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent';[18] to conserve and protect, with the state's assistance, the 'environment and the productive capacity of their lands or territories and resources';[19] and 'to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.[20]

Not to be outdone by their human rights counterparts, and no doubt particularly influenced by the sentiments reflected in the *ILO Convention* and draft texts of the *United Nations Declaration on the Rights of Indigenous Peoples,* international conservation organisations such as WWF, UNEP and the IUCN[21] have for the past two decades been grappling with the link between conservation and indigenous peoples' tenure and resource rights.[22] Clearly reflected in the *Caring for the Earth: A Strategy for*

[13] Article 3.
[14] Article 10.
[15] Article 18.
[16] Article 25.
[17] Article 26(2).
[18] Article 28(2).
[19] Article 29(1).
[20] Article 32(1).
[21] The work within the IUCN has largely been facilitated by its World Commission on Protected Areas (WCPA); and Commission on Environmental Economic and Social Policy's (CEESP): Theme on Indigenous and Local Communities, Equity and Protected Areas; and Theme on Governance, Equity and Rights.
[22] For a comprehensive discussion of these historical developments see: Kothari et al "Local Voices in

Sustainable Living[23] published in 1991, granted significant impetus through the inclusion of Article 8j[24] in the *Convention on Biological Diversity* and the creation of the *Progamme of Work on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity*,[25] it took some ten years for the link to be clearly enunciated: first, in the *IUCN Policy on Social Equity in Conservation and Sustainable Use;*[26] and secondly, in the *Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas*[27] developed under auspices of IUCN and WWF. The latter document neatly summarise the concerns of indigenous peoples in relation to protected areas[28] and expressly recognises that: protected areas will survive only if they

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Global Discussions" (2008) 1-7.

[23] Munro D & Holgate M (eds) *Caring for the Earth: A Strategy for Sustainable Living* (1991) IUCN, WWF & UNEP Gland. The document specifically urges all governments to encourage communities to debate their environmental priorities, develop local strategies and convert their strategies into action (Action Recommendation 7.5. at 57-63).

[24] Article 8j compels parties, as far to relevant and appropriate, and 'subject to [their] national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices'.

[25] *Programme of Work on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity* (annexed to COP5 Decision V/16). See specifically Element 1 (Task 2) thereof, which requires parties to 'develop appropriate mechanisms, guidelines, legislation or other initiatives to foster and promote the effective participation of indigenous and local communities in decision-making, policy planning and development and implementation of the conservation and sustainable use of biological diversity at international, regional, subregional, national and local levels, including access and benefit-sharing and the designation and management of protected areas, taking into account the ecosystem approach'.

[26] IUCN *Policy on Social Equity in Conservation and Sustainable Use* (2000). It expressly recognises the social, economic and cultural rights of indigenous peoples including: their right to lands and territories and natural resources; the respect of their social and cultural identity, customs, traditions and institutions; their right to full and just participation in all conservation activities supported and implemented by the IUCN; their right to make their own decisions affecting their lands, territories and resources; and the need to promote equity within conservation, and a more balanced distribution of costs and benefits, access and control, and decision-making opportunities, over natural resources (at 4).

[27] Beltran J *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (2000) Best Practice Protected Area Guidelines Series No.4, IUCN Gland.

[28] These concerns include the need to: effectively protect the ecological domains, as well as the people and cultures they contain, from external threats; recognise indigenous and other peoples' rights to their lands, territories and resources; recognise their rights to control and co-manage these resources within protected areas; allow participation of traditional institutions in co-management arrangements; recognise the right of indigenous and other traditional peoples to determine their own development priorities - as long as these are compatible with protected areas objectives; declare protected areas only at their initiative, and/or with their free and prior informed consent; and incorporate sustainable use of natural resources using methods that maintain the integrity of the ecosystem and that have been used traditionally by indigenous communities (Beltrán *Indigenous and Traditional Peoples and Protected Areas* (2000) 3).

are seen to be of value, in the widest sense, to the nation as a whole and to local people in particular; the territorial and resource rights of indigenous and other traditional peoples inhabiting protected areas must be respected by promoting and allowing full participation in the co-management of resources, and in a way that would not affect or undermine the objectives for the protected areas as set out in its management plan; knowledge, innovations and practices of indigenous and other traditional peoples have much to contribute to the management of protected areas; and governments and protected area managers should incorporate customary and indigenous tenure and resource use, and control systems, as a means of enhancing biodiversity conservation.[29]

The anticipated approach for overcoming these concerns is outlined in the five principles and their 22 underlying guidelines contained in *Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas*, which according to the document itself, jointly provide the basis upon which to develop partnerships between indigenous and other traditional peoples and protected area planners and managers.[30] The key principles in this regard are:[31]

- Principle 1 – 'Indigenous and other traditional peoples have long associations with nature and a deep understanding of it. Often they have made significant contributions to the maintenance of many of the earth's most fragile ecosystems, through their traditional sustainable resource use practices and culture-based respect for nature. Therefore, there should be no inherent conflict between the objectives of protected areas and the existence, within and around their borders, of indigenous and other traditional peoples. Moreover, they should be recognised as rightful, equal partners in the development and implementation of conservation strategies that affect their lands, territories, waters, coastal seas, and other resources, and in particular in the establishment and management of protected areas'.

[29] Beltrán *Indigenous and Traditional Peoples and Protected Areas* (2000) 4.
[30] Beltrán *Indigenous and Traditional Peoples and Protected Areas* (2000) x.
[31] Beltrán *Indigenous and Traditional Peoples and Protected Areas* (2000) 7-11.

- Principle 2 – 'Agreements drawn up between conservation institutions, including protected area management agencies, and indigenous and other traditional peoples for the establishment and management of protected areas affecting their lands, territories, waters, coastal seas and other resources should be based on full respect for the rights of indigenous and other traditional peoples to traditional, sustainable use of their lands, territories, waters, coastal seas and other resources. At the same time, such agreements should be based on the recognition by indigenous and other traditional peoples of their responsibility to conserve biodiversity, ecological integrity and natural resources harboured in those protected areas'.
- Principle 3 – 'The principles of decentralisation, participation, transparency and accountability should be taken into account in all matters pertaining to the mutual interests of protected areas and indigenous and other traditional peoples.'
- Principle 4 – 'Indigenous and other traditional peoples should be able to share fully and equitably in the benefits associated with protected areas, with due recognition to the rights of other legitimate stakeholders'.

The distillation of the above principles and guidelines have provided significant impetus for the subsequent inclusion of elements of the new conservation ideology in the recommendations and outputs of the World Parks Congress (Durban) 2003,[32] IUCN World Conservation Congresses[33] and the *Convention on Biological Diversity*'s Conferences of the Parties (COP).[34]

[32] World Parks Congress (Durban, 2003) - *Durban Accord*; *Durban Action Plan*; *WPC Message to the CBD*; and WPC Recommendations (V.17 *Recognising and Supporting a Diversity of Governance Types for Protected Areas*; V.24 *Indigenous Peoples and Protected Areas*; V.25 *Co-Management and Protected Areas*; V.26 *Community Conserved Areas*; V.27 *Mobile Indigenous Peoples and Conservation; V.29 Poverty and Protected Areas*).

[33] World Conservation Congress (Barcelona, 2008) - Resolution 4.47 *Empowering Local Communities to Conserve and Manage Natural Resources in Africa*; Resolution 4.48 *Indigenous Peoples Protected Areas and Implementation of the Durban Accord*; Resolution 4.49 *Supporting Indigenous Conservation Territories and Other Indigenous Peoples and Community Conserved Areas*; Resolution 4.52 *Implementing the UN Declaration on the Rights of Indigenous Peoples*; Resolution 4.53 Mobile *Indigenous Peoples and Biodiversity Conservation*; *Resolution 4.56 Rights-Based Approaches to Conservation*; and Recommendation 4.127 *Indigenous Peoples Rights in the Management of Protected Areas Fully or Partially in the Territories of Indigenous Peoples*. World Conservation Congress (Bangkok, 2004) - Resolution 3.15 *Conserving Nature and Reducing Poverty by Linking Human Rights and Conservation*; Resolution 3.18 *Mobile Peoples and Conservation*; *Resolution 3.49 Community Conserved Areas*; and Resolution 3.55 *Indigenous Peoples, Protected Areas and the CBD Programme of Work*.

Originally focussing on affording indigenous peoples' substantive and procedural rights, the resultant impact of the human rights discourse has been far broader. It has also contributed to the realisation that indigenous peoples can and do play a valuable role in conservation; conservation and use are not mutually exclusive; and, in accordance with the dictates of equity, indigenous peoples should share in the benefits and costs associated with conservation.

3.1.2 *Recognition of Sustainable Use, Access and Benefit-Sharing Imperatives*

Entrenched in the concept of 'sustainable development',[35] and similarly brought to public notoriety at the United Nations Conference for Environment and Development held in Rio in 1992,[36] international recognition of the notion of 'sustainable use' has propelled the tectonic shift. Defined as the 'use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity,

World Conservation Congress (Amman, 2000) - Resolution 2.15 *IUCN Collaborative Management for Conservation Programme*; Resolution 2.29 *IUCN Policy Statement on Sustainable Use of Wild Living Resources*; and Recommendation 2.92 *Indigenous Peoples, Sustainable Use of Natural Resources and International Trade*. World Conservation Congress (Montreal, 1996) - Resolution 1.33 *Conservation on Community and Privately Owned Land*; Recommendation 1.42 *Collaborative Management for Conservation*; Resolution 1.49 *Indigenous Peoples and the IUCN*; *Resolution 1.50 Indigenous Peoples, Intellectual Property Rights and Biological Diversity*; and Resolution 1.53 *Indigenous Peoples and Protected Areas*.

[34] See, for example: COP 10 (Nagoya, 2010) Decision X/31 (Protected Areas) and Decision X/40 (Article 8j and Related Provisions: Mechanisms to Promote the Effective Participation of Indigenous and Local Communities in the Work of the Convention); COP 9 (Bonn, 2008) Decision IX/13 (Article 8j and Related Provisions) and Decision IX/18 (Protected Areas); COP 8 (Curitiba, 2006) Decision VIII/5 (Article 8j and Related Provisions) and Decision VIII/24 (Protected Areas); and COP 7 (Kuala Lampur, 2004) Decision VII/16 (Article 8j and Related Provisions) and Decision VII/28 (Protected Areas).

[35] For a concise overview of the origin of the term 'sustainable development', see: Cordonier Segger M & Khalfan A *Sustainable Development Law: Principles, Practices and Prospects* (2004) Oxford University Press Oxford 15-23; and Marong A "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development" (2003) 16 (1) *Georgetown International Environmental Law Review* 22-29. The origin of the term is commonly identified as including: 1962 *General Assembly Resolution on Economic Development and the Conservation of Nature* (GA Resolution 1831(XVII)UNGAOR 17th Session Supp No 17, UN Doc A/RES/1831 (XVII)(1962)); the *Stockholm Declaration on the Human Environment* (1972) 11 *ILM* 1461; the *World Conservation Strategy* (1980) IUCN, WWF, UNEP, FAO & UNESCO; and *Our Common Futures* (1987) Report of the World Commission on Environment and Development, United Nations. 'Sustainable development' is defined in *Our Common Futures* as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'.

[36] The notion of sustainable development underpins the two key outputs of this Conference, namely: the *Rio Declaration* and *Agenda* 21 (*Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development* and *Agenda 21* (1992) 31 *ILM* 874).

thereby maintaining its potential to meet the needs and aspirations of present and future generations',[37] it has compelled the realm of conservation to abandon its traditional belief that conservation and use are mutually exclusive, and that people are an obstruction to conservation. It has entrenched the recognition that whilst 'resource use without resource management is non-sustainable', equally any 'attempt to establish resource management without resource use is likely to be futile'.[38] No longer can society 'frame conservation solutions as either "we touch it" or "we don't touch it"'.[39] It has furthermore highlighted the integral link between biodiversity, politics, economics and culture – specifically the feasibility of addressing poverty and livelihood security through enhancing the generation of conservation-related benefits to local people.[40]

Permeating the entire tenor of the *Convention on Biological Diversity,*[41] the concept of 'sustainable use' is specifically articulated in Article 10 which requires parties, as far as possible and appropriate, to: 'integrate consideration of conservation and sustainable use of biological resources into national decision-making'; and 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'. Given its central prominence, it is accordingly not surprising that the concept of sustainable use been recognised as a cross-cutting theme of the *Convention on Biological Diversity*,[42] permeated all subsequent decisions of its COPs,[43] and significantly influenced the

[37] *Convention on Biological Diversity* (1992) 31 *ILM* 818 (Article 2).
[38] Murphree M *Communities as Resource Management Institutions* (1992) Gatekeeper Series No.36, IIED London 12
[39] Steiner A "Critical Conservation - New Strategies for Engaging with Society" in *Biodiversity Science and Governance: Proceedings of the International Conference* (2005) Museum National d'Histoire Naturelle (Paris) 90.
[40] Kothari A "Protected Areas and People: The Future and the Past' (2007) 17(2) *Parks* 23.
[41] References to 'sustainable use' are crucially found in: Article 1 (Objectives); Article 6 (General Measures for Conservation and Sustainable Use); Article 7 (Identification and Monitoring); Article 8 (In Situ Conservation); Article 10 (Sustainable Use of Components of Biological Diversity); Article 11 (Incentive Measures); Article 12 (Research and Training); and Article 13 (Public Education and Awareness).
[42] COP 5 (Nairobi, 2000) Decision V/24 (Sustainable Use as a Cross-Cutting Theme).
[43] See for instance: COP 10 (Nagoya, 2010) Decision X/31 (Protected Areas) and Decision X/32 (Sustainable Use); COP 7 (Kuala Lumpur, 2004) Decision VII/12 (Sustainable Use); COP 5 (Nairobi, 2000) Decision VI/13 (Sustainable Use); COP 4 (Bratislava, 1998) Decision IV/4 (Status and Trends of the Biological Diversity of Inland Water Ecosystems and Options for Conservation and Sustainable Use); COP 3 (Buenos Aires, 1996) Decision III/9 (Implementation of Articles 6 and 8 of the Conservation); and COP 2 (Jakarta, 1995) Decision II/7 (Consideration of Articles 6 and 8 of the Convention). The two most

resolutions and recommendations emanating from the IUCN's World Conservation Congresses.[44]

The prominence afforded to 'sustainable use' is integrally connected to four additional conceptual shifts inherent in the *Convention on Biological Diversity*, namely the recognition of: the need to improve equitable access to natural resources by particularly indigenous and local communities; the value of and need to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities; the need to promote the wider application of such knowledge, innovations and practices and involvement of the indigenous and local communities in conservation; and the necessity and equity in sharing the benefits arising from the use of such knowledge, innovations and practices with indigenous and local communities. These shifts are similarly reflected in the text of the Convention itself,[45] and recent decisions emanating from its COP[46] and IUCN World Conservation Congresses.[47]

important outputs of the recent COPs has been the adoption of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation and Benefit-Sharing* (annexed to COP 10 (Nagoya, 2010) Decision X/1 (Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization); and the *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity* (annexed to COP 7 (Kuala Lumpur, 2004) Decision VII/12).

[44] World Conservation Congress (Barcelona, 2008) - Resolution 4.13 *Sustainable Use and Accountability*; Resolution 4.39 *Cross-Commission Collaboration on Sustainable Use of Biological Resources*; Resolution 4.47 *Empowering Local Communities to Conserve and Manage Natural Resources in Africa*; Resolution 4.58 *Conservation and Poverty Reduction*; and Recommendation 4.127 *Indigenous Peoples Rights in the Management of Protected Areas Fully or Partially in the Territories of Indigenous Peoples.* World Conservation Congress (Bangkok, 2004) - Resolution 3.12 *Governance of Natural Resources for Conservation and Sustainable Development*; Resolution 3.14 *Poverty Reduction, Food Security and Conservation*; and Resolution 3.174 *Implementing the Addis Ababa Principles and Guidelines for Sustainable Use of Biodiversity.* World Conservation Congress (Amman, 2000) - Resolution 2.29 *IUCN Policy Statement on Sustainable Use of Wild Living Resources*; Resolution 2.36 *Poverty Reduction and Conservation*; and Resolution 2.92 *Indigenous Peoples, Sustainable Use of Natural Resources*. World Conservation Congress (Montreal 1996) - Resolution 1.39 *Sustainable Use Initiative*; Resolution 1.42 *Collaborative Management for Conservation*; Resolution 1.50 *Indigenous Peoples, Intellectual Property Rights and Biological Diversity*.

[45] These shifts are evident in the following articles of the *Convention on Biological Diversity* (1992): Article 1 (Objectives); Article 8 (In Situ Conservation); Article 10 (Sustainable Use of Components of Biological Diversity); and Article 15 (Access to Genetic Resources).

[46] See note 43 above.

[47] See note 44 above.

3.1.3 *Systems Thinking, Participatory Management and Adaptive Management*

Conceptual shifts in ecological thinking have also contributed to the tectonic shift in conservation ideology. Four trends are discernible, namely: the shift from reductionism to systems thinking; the recognition of humans as integral components of ecosystems; the shift from an expert-based scientific approach to a multidisciplinary participatory approach to conservation; and the recognition of the principle of adaptive management.[48]

For centuries, ecologists have sought to break down complex systems into their smallest components (an array of simple systems) in order to understand each of these components and ultimately the complex system as a whole. However, the growing realisation that complex ecological systems have a number of attributes which do not lend themselves to such analysis (such as non-linearity, uncertainty, emergence, scale and self-organisation) have compelled ecologists to rethink the merits of their reductionist thinking and adopt of a systems-thinking approach which seeks to analyse all components of the system simultaneously, recognizing the relationships between them and their attributes which defy reduction.[49] This shift towards a systems-thinking approach has compelled conservationists to reconsider their understanding of ecological functioning, the processes which impact on it, and the shape and form of governance structures suitable for managing these impacts.

[48] Several of these trends are reflected in decisions and recommendations emanating from the CBD COPs. See, for example: COP 9 (Bonn, 2008) Decision IX/7 (*Ecosystems Approach*); COP 5 (Nairobi, 2000) Decision V/6 (*Ecosystems Approach*). They are further reflected in the decisions emanating from the IUCN World Conservation Congresses. See, for example: World Conservation Congress (Barcelona, 2008) - Resolution 4.47 *Empowering Local Communities to Conserve and Manage Natural Resources in Africa*; World Conservation Congress (Amman, 2000) - Resolution 2.2 *Integrating Ecosystem Management in the IUCN Programme*; Resolution 2.15 *IUCN Collaborative Management for Conservation Programme*; Resolution 2.29 *IUCN Policy Statement on Sustainable Use of Wild Living Resources*; and Recommendation 2.92 *Indigenous Peoples, Sustainable Use of Natural Resources and International Trade*; and World Conservation Congress (Montreal, 1996) - Recommendation 1.42 *Collaborative Management for Conservation.*

[49] Berkes F "Rethinking Community-Based Conservation" (2004) 18(3) *Conservation Biology* 622-623. See further: Brooks R, Jones R & Virginia R *Law and Ecology: The Rise of the Ecosystems Regime* (2002) Ashgate Publishing Ltd Aldershot; Levin S *Fragile Dominium: Complexity and the Commons* (1999) Perseus New York; and Gunderson l & Holling C *Panarchy: Understanding Transformations in Human and Natural Systems* (2002) Island Press Washington DC.

Allied to the above, is the trend to recognise humans as integral components of nature, and not as distinct elements to, or the masters of, it. Inherent in the notion of social-ecological systems, and facilitated through the rise of transdisciplinary fields such as political ecology,[50] it has transformed thinking about the appropriate modes and forms of natural resource governance, and raised interest in traditional and/or customary forms of governance which have sustained many social-ecological systems for centuries prior to the advent, or in many cases imposition, of western modes of conservation.[51]

Environmental problems tend to be very complex and are inherently unsuitable for analysis through a conventional scientific approach that seeks to define the problem, collect the data, analyse the data and come to a decision on the basis of such analysis.[52] They involve 'wicked problems', problems that are not easily resolved through conventional expert-based scientific enquiry as they are frequently shifting, require constant redefinition and are permeated with values and principles of equity and social justice.[53] The above realisation has led ecologists to seek new approaches to understanding and describing the complexities inherent in social-ecological systems – placing greater reliance on what has been called 'traditional ecological knowledge' or 'fusion knowledge' – knowledge generated through participatory interdisciplinary enquiry as opposed to through static expert-based scientific enquiry; knowledge which is 'neither strictly local or traditional, nor external or scientific'.[54] In the realm of

[50] Originating in the 1980's, political ecology seeks to 'analyse environmental or ecological conditions as the product of political and social processes, related at a number of nested scales from the local to the global' (Adams W & Hutton J "People, Parks and Poverty: Political Ecology and Biodiversity Conservation" (2007) 5(2) *Conservation and Society* 148-149). See further: Bryant R & Bailey S *Third World Political Ecology* (1997) Routledge London.

[51] Berkes (2004) *Conservation Biology*, 623. See further: Berkes F & Folke C (eds) *Linking Social and Ecological Systems: Management Practices and Social Mechanisms for Building Social Resilience* (1998) Cambridge University Press Cambridge; and Berkes F, Colding J & Folke C (eds) *Navigating Social Ecological Systems: Building Resilience for Complexity and Change* (2003) Cambridge University Press Cambridge.

[52] Berkes (2004) *Conservation Biology*, 623-624.

[53] Rittel H & Webber M "Dilemmas in a General Theory of Planning" (1973) 4 *Policy Sciences* 155-169. See further: Jones M "Trying to Make Sense of it All: Dealing with the Complexities of Community-Based Natural Resource Management" in Mukamuri B, Manjengwa J & Anstey S (eds) *Beyond Proprietorship: Murphree's Laws on Community-Based Natural Resource Management in Southern Africa* (2009) Weaver Press Harare 184-187; and Ludwig D "The Era of Management is Over" (2001) 4 *Ecosystems* 758-764.

[54] Brown (2003) *Global Ecology & Biogeography* 90; and Berkes (2004) *Conservation Biology* 623-625. For further information on traditional ecological knowledge, see: Berkes F, Colding J & Folke C "Rediscovery of Traditional Ecological Knowledge as Adaptive Management" (2000) 10 *Ecological*

conservation, this has altered the approach to distilling effective forms of natural resource governance, raised the profile of alternative forms of natural resource governance (including community-based conservation) and led to the inclusion of indigenous peoples' and local communities' practices, knowledge, interests and personnel in research enterprises.[55] This approach is clearly reflected in the *Convention on Biological Diversity's Strategic Plan (2011-2020)* and the *Aichi Targets* adopted at COP10 in Nagoya in 2010.[56]

The final shift in ecological thinking relates to adaptive management, which is founded on the recognition that humans do not have sufficient understanding of social-ecological systems to accurately and predictably manage them; and that the imposition of predefined inflexible expert-based management solutions is accordingly an inappropriate conservation response.[57] In contrast, adaptive management 'formulates management policies as experiments that probe the responses of ecosystems as people's behaviour in them changes' and that it is through these experiments that humans can 'learn something about the ecosystem's processes and structures' and 'seek to design better policies' for managing them.[58] It effectively amounts to 'learning by doing'.[59] Its rise in prominence in the ecological discourse has led to the evolution of associated concepts, crucially: 'adaptive co-management', defined as '... a process by which institutional arrangements and ecological knowledge are tested and revised in

Applications 1251-1262; and Berkes F *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (1999) Taylor & Francis Philadelphia.

[55] Berkes (2004) *Conservation Biology* 624-625.

[56] COP 10 (Nagoya, 2010) Decision X/2 (Strategic Plan for Biodiversity 2011-2020). See specifically Strategic Goal E (Enhance Implementation Through Participatory Planning, Knowledge Management and Capacity Building) which mandates parties by 2020, to respect the 'traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity' and promote the 'full and effective participation of indigenous and local communities at all levels' (Target 18).

[57] For further discussion on 'adaptive management', see: Oglethorpe J *Adaptive Management: From Theory to Practice* (2002) Sui Technical Series Vol. 3, IUCN Gland; Mclain R & Lee R "Adaptive Management: Promises and Pitfalls" (1996) 20(4) *Environmental Management* 437-448; Walters C *Adaptive Management of Renewable Resources* (1986) McGraw Hill New York; and Holling C (ed) *Adaptive Environmental Assessment and Management* (1978) Wiley London (reprinted by Blackburn Press in 2005).

[58] Lee K "Appraising Adaptive Management (1999) 3(2) *Conservation Ecology, Article 3* (available online at http://www.ecologyandsociety.org/vol3/iss2/art3/).

[59] Berkes F, "Evolution of Co-Management: Role of Knowledge Generation, Bridging Organisations and Social Learning" (2009) 90 *Journal of Environmental Management* 1692.

dynamic, ongoing, self-organised process of trial-and-error';[60] and 'adaptive co-management systems', defined as 'flexible community-based systems of resource management tailored to specific places and situations and supported by, and working with, various organisations at different levels'.[61]

Two essential traits inherent in adaptive management, and its offspring adaptive co-management and adaptive co-managed systems, have significantly contributed to the tectonic shift in conservation ideology.[62] First, its recognition that the inherent uncertainty and unpredictability in social-ecological systems requires the frequent re-evaluation and adaptation of management solutions; management solutions that cannot simply be imposed from the top-down, but should rather be informed and generated from the bottom-up. Secondly, in its recognition of the merits of co-management, the fact that effective conservation frequently involves and requires collaborative governance between several institutions as opposed to centralised top-down state control. These traits, some commentators argue, are similarly inherent in, and perpetuated through, the increased reliance placed on traditional ecological knowledge as opposed to static expert-based scientific enquiry.[63]

[60] Folke C, Carpenter S, Elmqvist T, Gunderson L, Holling C, Walker B, Bengtsson J, Berkes F, Colding J, Danell K, Falkenmark M, Moberg F, Gordon L, Kaspersson R, Kautsky N, Kinzig A, Levin S, Mäler K, Ohlsson L, Olsson P, Ostrom E, Reid W, Rockström J, Savenije H & Svedin U *Resilience and Sustainable Development: Building Adaptive Capacity in a World of Transformations* (2002) Series on Science for Sustainable Development No.3, ICSU Paris 20. See further: Ruitenbeek J & Cartier C *The Invisible Wand: Adaptive Co-Management as an Emergent Strategy in Complex Bio-Economic Systems* (2001) Occasional Paper No.34, CIFR Bogor 8. The latter authors define 'adaptive co-management' as 'a long-term management structure the permits stakeholders to share management responsibility and to learn from their actions'.

[61] Olsen P, Folke C & Berkes F "Adaptive Co-Management for Building Resilience in Social-Ecological Systems" (2004) *Environmental Management* 34(1) 75. See further: Folke C, Carpenter S, Elmqvist T, Gunderson L, Holling C & Walker B "Resilience and Sustainable Development: Building Adaptive Capacity in a World of Transformations" (2002) 31(5) *Ambio* 437-440.

[62] See Berkes (2009) *Journal of Environmental Management* 1698; Berkes (2004) *Conservation Biology* 626; and Olsen et al (2004) *Environmental Management* 75.

[63] Berkes et al (2000) *Ecological Applications* 1260.

3.1.4 *Appreciation that Communal Property Regimes are Effective Forms of Tenure for Managing the Natural Commons*

As comprehensively canvassed in Chapter 2, and accordingly not meriting repetition here, the past two decades have evidenced significant shifts in the scholarship of economists and property rights theorists as they have sought to deal with the aftermath of Hardin's Tragedy of the Commons.[64] Key recent trends in their discourse have included: the rejection of regulation and privatisation as the only solutions for conserving common-pool natural resources; the drawing of a clear distinction between open-access regimes and communal property regimes; the resultant recognition of communal property as a viable form of tenure for facilitating the conservation of common-pool natural resources; and the recent concentration on distilling the essential elements which contribute to, or undermine its ability to do so.

The theoretical and empirical research underpinning the above shift in common's scholarship has had a profound impact on the conservation discourse and is largely responsible for: debunking the conventional reliance on privatisation and state regulation as the only workable solutions for managing common-pool natural resources; raising the profile and potential of community-based conservation initiatives; and triggering an interest in different models of protected areas governance.

3.1.5 *Acknowledgement of the Diversity of Protected Areas Governance*

Similarly comprehensively canvassed in Chapter 2, the past decade of scholarship emanating from the realm of conservation, has been characterised by an increased focus on governance, particularly the diversity of governance options at play in the context of protected areas.[65] Originating in the run-up to the World Parks Congress (2003) and culminating in the recent inclusion of governance types in the *IUCN Management Guidelines (2008)*, this scholarship has led to the recognition of a diversity

[64] See Chapter 2 (Part 2).
[65] See Chapter 2 (Part 3.3).

of forms of protected governance, notably community conserved areas and co-managed areas, which it is argued above fall neatly under the broader rubric of CCAs.

As in the context of commons scholarship, the theoretical and empirical research surrounding the contemporary focus on governance has highlighted the merits of decentralisation, possible models for such decentralisation, and the key role indigenous peoples and local communities can play as both potential partners in government and private protected areas, and as custodians and managers in the own right through CCAs.[66]

3.2 THE NATURE OF THE TECTONIC SHIFT

The above five broad trends permeating the discourse of human rights advocates, economists, property rights theorists, ecologists and conservationists in the past twenty years have cumulatively compelled policy-makers to rethink the merits of their almost wholesale reliance on the conventional protectionist, exclusionary state-centred approach to conservation. So what were the fundamental elements of this approach and how did they manifest in protected areas.

3.2.1 *Conventional Protectionist, Exclusionary, State-Centred Approach*

For the majority of the nineteenth and twentieth century the dominant conservation ideology was largely protectionist, exclusionary and state-centred. This approach was founded on the belief that effective conservation required the exclusion of people and stringent centralised top-down state control. Human access to and use of natural resources subject to protection were viewed as diametrically opposed to the objects of conservation, and therefore rural communities residing adjacent to natural resources requiring conservation were viewed as 'enemies'. Furthermore, rural development agendas and conservation agendas were viewed as mutually exclusive.

[66] Kothari (2007) *Parks* 23.

In the context of protected areas, the conventional approach was for governments to establish protected areas on state-owned land, or where this was unavailable, on other land they conveniently regarded as *res nullius* irrespective of the existence of customary communal proprietary rights of indigenous peoples and local communities over such land.[67] The latter was the favoured approach of African colonialists with the result that many rural African communities were forcibly relocated and deprived access to the very natural resources they relied on for their physical, spiritual and cultural well-being.[68]

The past two decades have, however, evidenced a significant shift in conservation ideology with scholars questioning the theoretical assumptions underpinning the conventional approach.[69] Driven by continued disquiet on the part of disenfranchised rural communities, the heightened socio-economic challenges facing these communities

[67] See generally: Buscher B & Whande W "Whims of the Winds of Time? Emerging Trends in Biodiversity Conservation and Protected Area Management" 2007 (5) *Conservation and Society* 22-43; Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 8-10; Summers R "Legal and Institutional Aspects of Community-Based Wildlife Conservation in South Africa, Zimbabwe and Namibia" (1999) *Acta Juridica* 188-210; and Munro D & Holgate M (eds) *Caring for the Earth: A Strategy for Sustainable Living* (1991) IUCN, WWF & UNEP Gland 57-63.

[68] See generally: Roe D & Nelson F "The Origins and Evolution of Community-Based Natural Resource Management in Africa" in Roe D, Nelson F & Sandbrook C (eds) *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (2009) Natural Resource Issues No. 18, IIED London 5-6; Hoole A *Lessons from the Equator Initiative: Common Property Perspectives for Community-Based Conservation in Southern Africa and Namibia* (2007) IDRC, UNEP & University of Manitoba Winnipeg 1; Reid H, Fig D, Magome H & Leader-Williams N "Co-management of Contractual National Parks in South Africa: Lessons from Australia" (2004) 2 *Conservation and Society* 378; Adams W "Nature and the Colonial Mind" in Adams W & Mulligan M (eds) *Decolonizing Nature: Strategies for Conservation in a Post-colonial Era* (2003) Earthscan London 16-50; Plumwood V "Decolonizing Relationships with Nature" in Adams et al *Decolonizing Nature* (2003) 51-78; Fabricius C, Kock D & Magome H "Towards Strengthening Collaborative Ecosystem Management: Lessons from Environmental Conflict and Political Change in Southern Africa" (2001) 31(4) *Journal of the Royal Society of New Zealand* 832; Summers (1999) *Acta Juridica* 188; Kiss A (ed) *Living with Wildlife: Wildlife Resource Management With Local Participation in Africa* (1990) World Bank Technical Paper No.130 (Africa Technical Department Series) Washington 5; Anderson D & Grove R "Introduction: The Scramble for Eden: Past, Present and Future in African Conservation" in Anderson D & Grove R *Conservation in Africa: People, Policies and Practice* (1987) Cambridge University Press Newcastle Upon Tyne 7.

[69] These assumptions include: protected areas require strict protection; biodiversity is a moral imperative; conservation linked to development does not protect biodiversity; harmonious, ecologically friendly local communities are myths; and emergency situations require extreme measures. See generally: Hutton J, Adams W & Murombedzi J "Back to the Barriers? Changing Narratives in Biodiversity Conservation" (2005) 2 *Forum for Development Studies* 356-363; Wilhusen P, Brechin S, Fortwangler C & West P "Reinventing A Square Wheel: Critique of a Resurgent 'Protection Paradigm' in International Biodiversity Conservation" (2002) 15 *Society and Natural Resources* 19-35; and Adams W & Hulme D "Conservation and Community: Changing Narratives. Policies & Practices in African Conservation" in Hulme D & Murphree M (eds) *African Wildlife and Livelihoods: The Promise and Performance of Community Conservation* (2001) James Currey Ltd Oxford 9-23.

and the demise of many conventional protected areas, policy-makers have been compelled to rethink their 'outdated and unrealistic' ideology aimed at what one commentator refers to as the 'total preservation of wildlife sanctuaries as some kind of glorified zoo'.[70]

3.2.2 *Contemporary Inclusive, Participatory, Human-Centred Approach*

In sharp contrast to the above, the contemporary conservation ideology affords conservation an 'increasingly human form'[71] and identifies the provision of benefits to, and attainment of the cooperation of, local communities as necessary prerequisites for effective conservation.[72] It recognises that communities can, under the right circumstances, be effective institutions for resource management,[73] and calls for 'new, more ethical, forms of engagement with such communities'.[74] It is accordingly integrally tied to concepts such as 'community-based natural resource management'[75] and/or 'community-based conservation'[76] which have arisen from the scholarship surrounding the natural commons and its recognition of communal property, and the communities holding such land tenure, as viable and effective options and agents for conservation.[77] These concepts, which are frequently used interchangeably, envisage the possible co-

[70] Summers (1999) *Acta Juridica* 189. See further: Kothari (2007) *Parks* 24; and Berkes F "The Problematique of Community-Based Conservation in a Multi-Level World" (2006) Unpublished paper presented at 11th Conference of the International Association for the Study of Common Property, Bali, June 2006, 4-5.

[71] Sanderson et al "The New Politics of Protected Areas" in Brandon et al *Parks in Peril* (1998) 441.

[72] Summers (1999) *Acta Juridica* 189.

[73] Murphree *Communities as Resource Management Institutions* (1992) 12.

[74] Adams W & Mulligan M "Introduction" in Adams et al *Decolonizing Nature* (2003) 10.

[75] 'Community-based natural resource management' focuses of the 'collective management of ecosystems to improve human well-being, and aims to 'devolve authority for ecosystem management to the local (community) level, thereby empowering communities to manage their own resources without permanently damaging, depleting or degrading them' (Fabricius C & Collins S "Community-Based Natural Resource Management: Governing the Commons" (2007) 9(2) *Water Policy* 84). See further: Fabricius C "Conservation and Communities - Learning from Experience" in Palmer R, Timmermans H & Fay D (eds) *From Conflict to Negotiation - Nature-Based Development on South Africa's Wild Coast* (2002) HSRC Press Pretoria 257.

[76] 'Community-based conservation' has been defined as 'the coexistence of people and nature, as distinct from protectionism and the segregation of people and nature' and as including 'natural resources or biodiversity protection by, for, and with the local community'. See: Western D & Wright R "The Background to Community Based Conservation" in Western D, Wright & Strum S. (eds) *Natural Connections: Perspectives in Community-Based Conservation* (1994) Island Press Washington DC 7-8.

[77] See the discussion in Chapter 2 (Part 2).

existence of people and nature and are based on the idea that if conservation and development are simultaneously achieved, the interests of both can be served.[78]

In the context of protected areas, this new ideology would appear to vary from its conventional counterpart in four main respects. First, it recognises that '(c)onservation is a positive concept embracing preservation, maintenance, sustainable utilization, restoration and enhancement of the natural environment'.[79] It accordingly recognises the close connection, and not mutual exclusivity, of conservation and sustainable use, and the possibility of granting access and use rights to local communities over natural resources situated in protected areas.[80]

Secondly, rather than seeking to conceal the political and socio-economic agendas frequently underlying or impacting on their conservation counterpart, it recognises that conservation is a 'very political issue',[81] some would argue a 'social and political process';[82] and that protected areas are frequently a 'political construct'.[83] It accordingly advocates the proper disclosure and consideration of the broader political and socio-economic context when formulating and implementing conservation policy, including that associated with the declaration and management of protected areas.[84] According to Brechin *et al*,[85] this should include a consideration of the following six key elements: human dignity;[86] legitimacy;[87] governance;[88] accountability;[89] adaptation and learning;[90]

[78] Murphree M "Protected Areas and the Commons" (2002) *Common Property Resource Digest* 2. See generally: Hoole *Lessons from the Equator* (2007) 2; Berkes (2004) *Conservation Biology* 622; Brown (2003) *Global Ecology & Biogeography* 89-92; Adams et al "Changing Narratives" in Hulme et al *African Wildlife and Livelihoods* (2001); McNeely J (ed) *Expanding Partnerships in Conservation* (1995) Island Press Washington DC; Western et al "The Background to Community Based Conservation" in Western et al *Natural Connections* (1994); Cock J & Koch E (eds) *Going Green: People, Politics and Environment in South Africa* (1991) Oxford University Press Oxford.

[79] Makombe K *Sharing the Land - Wildlife, People and Development in Africa* (1994) Environmental Issue Series No.1, IUCN/ROSA Harare 4.

[80] Brown (2003) *Global Ecology & Biogeography* 89; and Summers (1999) *Acta Juridica* 191.

[81] Anderson et al "Introduction" in Anderson et al *Conservation in Africa* (1987) 6.

[82] Brechin S, Wilshusen P, Fortwangler C & West P "Beyond the Square Wheel: Toward a More Comprehensive Understanding of Biodiversity Conservation as a Social and Political Process" (2002) 15 *Society and Natural Resources* 42-51.

[83] Sanderson et al "The New Politics of Protected Areas" in Brandon et al *Parks in Peril* (1998) 441.

[84] Summers (1999) *Acta Juridica* 189; Brandon K "Perils to Parks: The Social Context of Threats" in Brandon et al *Parks in Peril* (1998) 415-439.

[85] These issues are highlighted in Brechin et al (2002) *Society and Natural Resources* 42-51.

[86] Affording recognition to human dignity seeks to not only establish the moral parameters for the conservation initiative, but also to afford recognition to the principles of social justice (including

and the impact of non-local forces on the conservation initiative.[91] In so doing, it seeks to overcome the historic hostility frequently shown by local communities towards those protected areas established in a fictional political, social and economic vacuum; hostility which has often led to the wilful obstruction and ultimate demise of many protected areas in the past.[92]

Thirdly, it emphasises the need to decentralise authority over protected areas, and the natural resources situated within them, to the local communities who depend on them for their very survival, as without such decentralisation, local communities have few incentives to collectively invest in natural resource management.[93] It accordingly envisages collective governance and seeks to empower local communities, drawing on their localised knowledge and proximate location, to manage the resources on which they are dependent in a sustainable manner.[94] It views local communities as potential 'adaptive co-managers' as opposed to 'powerless spectators',[95] partners which are able to both share the load of conventional conservation authorities and adapt their practices to changing ecological, social and economic conditions. In so doing, it seeks to

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participation; self-representation and self-determination).

[87] Affording recognition to legitimacy seeks to strengthen the agreements, institutional structure and rules underpinning the conservation initiative - essential in light of the fact that conservation frequently involves placing restrictions on peoples' interests.

[88] Affording recognition to governance seeks to ensure the decision-making and power-sharing structures are tailored to suit the context of the conservation initiative.

[89] Affording recognition to accountability seeks to ensure that responsibilities in relation to the conservation initiative are clearly defined and that the requisite performance monitoring and reporting processes are in place.

[90] Affording recognition to adaptation and learning seeks to ensure constant reflection on the performance of the conservation initiative and the adaptation of it to suit changing circumstances.

[91] Affording recognition to non-local forces ensures that the scale of the conservation initiative is appropriate, and that the necessary measures and relationships are in place to mitigate the impacts of external forces on the conservation initiative.

[92] Hoole *Lessons from the Equator Initiative* (2007) 1; Agrawal A & Redford K *Poverty, Development and Biodiversity Conservation: Shooting in the Dark* (2006) Working Paper No.26, Wildlife Conservation Society New York 17; and Summers (1999) *Acta Juridica* 188.

[93] Fabricius et al (2007) *Water Policy* 84; Brown (2003) *Global Ecology & Biogeography* 89; Nelson et al (2008) *Development and Change* 558; Summers (1999) *Acta Juridica* 191; and McNeely J "Protected Areas and Human Ecology: How National Parks Can Contribute to Sustaining Societies of the Twenty-First Century" in Western D & Pearl M (eds) *Conservation for the Twenty-first Century* (1992) Oxford University Press New York 156.

[94] Fabricius et al (2007) *Water Policy* 84.

[95] Fabricius C, Folke C, Cundill G & Schultz L "Powerless Spectators, Coping Actors and Adaptive Co-Managers: A Synthesis of the Role of Communities in Ecosystem Management" (2007) 12(1) *Ecology & Society* 29.

overcome several of the problems associated with protected areas established under the conventional paradigm, such as: government capacity and resource constraints; overly bureaucratic and managerially distanced conservation authorities; a lack of knowledge of local ecological dynamics and the factors impacting on them; and a lack of local community support.[96]

Finally, it adopts a market-based orientation that focuses on making protected areas not simply environmentally desirable but also economically feasible.[97] In so doing, it recognises the link between conservation and development, and that the former can facilitate the latter, and the latter the former. It furthermore emphasises the need to create the necessary mechanisms and incentives for conservation to become an economically viable land-use and for local communities to contribute to and economically benefit from the establishment of protected areas.[98]

3.3 AFTERMATH OF THE TECTONIC SHIFT

Whilst the tectonic shift in conservation ideology has permeated global and domestic conservation and protected areas policy frameworks, its practical manifestation appears to have fallen short of expectation.[99] This is expressly recognised in the latest *In-Depth Review of the Implementation of the Programme of Work on Protected Areas,*[100] undertaken under the auspices of the CBD Subsidiary Body on Scientific, Technical and Technological Advice, where it is stated that the implementation of Programme Element 2 (Governance, Participation, Equity and Benefit-Sharing) is 'way behind' global and regional targets.[101]

[96] Bromley W & Cernea M *The Management of Common Property Natural Resources and Some Conceptual and Operational Fallacies* (1988) World Bank Discussion Paper No.57, World Bank Washington 25; and Murphree *Communities as Resource Management Institutions* (1992) 3-4.
[97] Brown (2003) *Global Ecology & Biogeography* 89.
[98] Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 256.
[99] See Kothari A "Protected Areas and People: The Future of the Past" (2008) 17(1) *Parks* 29-30, where the author overviews the implementation of Programme Element 2 (Governance, Participation, Equity and Benefit-Sharing) of the *CBD Programme of Work on Protected Areas* (adopted at COP 7 of the *Convention on Biological Diversity* held in Kuala Lampur in 2004 and annexed to COP 7 Decision VII/28).
[100] *UNEP/CBD/SBSTTA/14/5* dated 14 January 2010.
[101] Ibid 8-9.

Many jurisdictions, notably in Southern Africa, which have sought to give effect to the new conservation ideology through CCAs, have faced a myriad of problems often leading to the depletion of the very biodiversity they seek to conserve and/or the undermining of the livelihoods of the very communities they seek to improve.[102] This has fuelled rich debate among scholars during the past ten years regarding the merits of the shift towards a more inclusive, participatory human-centred conservation paradigm.

If one surveys these debates, there appear to be two main schools of thought. The first school, comprising of predominantly natural science scholars, argues for the return to the conventional exclusionary, state-centred protectionist approach owing to several apparent flawed assumptions underlying the contemporary human-centred approach.[103] The second school, comprising of predominantly social science scholars, supports continued reliance on a more inclusive, participatory human-centred approach and argue that whilst there may be problems with its practical implementation, these are but teething problems and insufficient to render the entire approach fatally flawed.[104] Falling

[102] In the Southern African context, see generally: Nelson et al (2008) *Development and Change* 557-585; Fabricius et al (2007) *Water Policy* 83-97; Hoole *Lessons from the Equator Initiative* (2007); Blaikie P "Is Small Really Beautiful? Community Based Natural Resource Management in Malawi and Botswana" (2006) 34 (11) *World Development* 1942-1957; Jones B & Murphree M "Community-Based Natural Resource Management as a Conservation Mechanism: Lessons and Directions" in Child B (ed) *Parks in Transition: Biodiversity, Rural Development and the Bottom Line* (2004) Earthscan London; Fabricius C "The Fundamentals of Community-Based Natural Resource Management" in Fabricius C, Kock E, Magome H & Turner S (eds) *Rights, Resources and Rural Development: Community Based Natural Resource Management in South Africa* (2004) Earthscan London 3-43; Magome & Fabricius C "Reconciling Biodiversity Conservation with Rural Development" in Fabricius et al *Rights, Resources and Rural Development* (2004) 93-114; Leach M, Mearns R & Scoones I "Environmental Entitlements: Dynamics and Institutions in Community-Based Natural Resource Management' (1999) 27(2) *World Development* 225-247; and Summers (1999) *Acta Juridica* 188-210.

[103] Scholars who fall in this school include: Chapin M "A Challenge for Conservationists" (2004) 17 (6) *World Watch* 17-31; Terborgh J "Reflections of a Scientist on the World Parks Congress" (2004) 18 *Conservation Biology* 619-620; Terborgh J *Requiem for Nature* (1999) Island Press/Shearwater Books Washington DC; Oates J *Myth and Reality in the Rain Forest: How Conservation Strategies are Failing in West Africa* (1999) University of California Press Berkley; Oates J "The Dangers of Conservation by Rural Development: A Case Study from the Forest of Nigeria" (1995) 29 *Oryx* 115-122; Brandon et al *Parks in Peril* (1998); and Kramer R, van Schaik C & Johnson J (eds) *The Last Stand: Protected Areas and the Defence of Tropical Diversity* (1997) Oxford University Press New York.

[104] Scholars who fall in this school include: Brechin et al (2002) *Society and Natural Resources* 41-64; Wilhusen et al (2002) *Society and Natural Resources* 17-40; Adams et al (2007) *Conservation & Society* 147-183; Hutton et al (2005) *Forum for Development Studies* 341-370.

within the second school of thought are those working tirelessly to highlight the many CCA success stories.[105]

As should be evident from the concretisation of several elements of the new conservation ideology in the CBD, the decisions of its COP, and the resolutions and recommendations emanating from recent IUCN World Conservation Congresses and World Parks Congresses, the latter school of thought appears to have triumphed. As a result, contemporary scholarly debates fortunately focus less on the divides, and rather on examining the elements inherent in successful and unsuccessful efforts to implement the inclusive, participatory, human-centred approach within protected areas.[106] It is to an analysis of these elements that I now turn; elements that theoretically facilitate the implementation of this contemporary approach through CCAs.

4. ESSENTIAL ELEMENTS OF COMMUNALLY-CONSERVED AREAS

Debates regarding the elements inherent in successful and unsuccessful efforts to implement a more inclusive, participatory and human-centred approach to conservation within protected areas have arisen from four different yet related discourses. These are the regulation of the natural commons through communal property regimes; the promotion of good-governance within protected areas, the regulation of co-managed (or otherwise known as collaboratively managed) protected areas; and the regulation of community (or otherwise known as indigenous people's) protected areas.

I purposely introduced a broad definition of CCAs. The definition seeks to traverse the somewhat arbitrary divide between these four discourses. In so doing, the elements identified in each becomes of relevance when seeking to distil a series of elements

[105] These scholars include: Kothari et al "Local Voices in Global Discussions" (2008); Goriup (ed) "Community Conserved Areas" (2006) 16(1) Special Edition of *Parks: International Journal for Protected Areas Managers;* Kothari A "Collaboratively Managed Protected Areas" and "Community Conserved Areas" in Lockwood M, Worboys G & Kothari A (eds) *Managing Protected Areas - A Global Guide* (2006) Earthscan London; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004).

[106] Naughton-Treves L, Holland M & Brandon K "The Role of Protected Areas in Conserving Biodiversity and Sustaining Local Livelihoods" (2005) 30 *Annual Review of Environmental Resources* 245.

underpinning the potential of CCAs to facilitate a more inclusive, participatory and human-centred approach to conservation within protected areas. Owing to the diversity of forms of CCAs, it is impossible to distil a comprehensive list applicable in every context. I have therefore sought to extract from the relevant literature the main elements that should underlie most forms of CCAs. For the purpose of analysis, I have divided these elements under the following main themes: types of communally-conserved areas; planning; consultation and negotiation; land tenure; declaration; institutions; management; access, use and benefit-sharing; and financing and support. As the scope of this dissertation is delimited to those forms of CCAs prescribed by statute, my analysis of these elements is similarly so circumscribed.

4.1 TYPES OF COMMUNALLY-CONSERVED AREAS

As I have argued in Part 2 above, CCAs are underpinned by communal land rights that differ in respect of their basis and form. Regarding their basis, communal land rights may stem from statute, contract, common law or custom. Regarding their form, they may entail full ownership, lease and other forms of limited real rights. CCAs are similarly subject to a diverse array of management regimes, both in respect of the basis of such management (custom, statutory, contractual, de facto) and the form of management (including co-management; joint management and transboundary management). Finally, CCAs are subject to a range of beneficiation regimes that may differ in respect of the basis of beneficiation (custom, statutory, contractual, de facto) and form of beneficiation (rights/benefits and responsibities/costs). This diversity needs to be recognised in any regime seeking to promote CCAs. A failure to do so may unduly preclude the ability of administrators and communities to fashion solutions best fitted to the specificity of the area and the often varying interests of relevant stakeholders.

This diversity could be recognised in several ways. First, the statutory framework could provide for different categories of CCAs. These could include those identified in the *IUCN Management Guidelines (2008)*, such as collaboratively managed areas, joint managed areas, indigenous peoples protected areas and community conserved areas.

However, as I have argued in Chapter 2 above, I do not advocate such an approach. I rather propose the fashioning of a range of legal tools to enable communities to become involved in protected areas in varying capacities such as landowners, rights-holders, managers, co-managers, resource users and beneficiaries. Any statutory framework providing for CCAs should accordingly prescribe such tools. The legal mechanism underpinning the majority of these tools would be an agreement concluded between the government or duly appointed management authority, and the community.[107]

4.2 PLANNING

The legal framework should empower both the government and/or relevant community to initiate the process to establish a CCA.[108] Comprehensive planning underpins the success of all protected areas, including CCAs.[109] Prior to their establishment, the area's environmental, social, economic and political context needs to be fully understood.[110] Relevant studies should be commissioned and distributed to stakeholders.[111] Care should be taken in identifying these stakeholders given the diversity of formal and informal institutions with a potential interest in, or potentially affected by, the establishment of the area.[112] These stakeholders could include: government authorities from all three spheres (fulfilling their conservation, land and socio-economic development mandates); local community representatives; traditional leaders; surrounding landowners; non-government organisations; and third parties with potential commercial interests in the area. Given that local communities are rarely

[107] Beltran J *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (2000) Best Practice Protected Areas Guidelines Series No.4, IUCN Gland 7.
[108] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 529-33.
[109] Bakaar M & Lockwood M "Establishing Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 212; and Borrini-Feyerabend G, Pimbert M, Farvar T, Kothari A & Renard Y *Sharing Power. Learning by Doing in Co-Management of Natural Resources Throughout the World* (2004) IIED & IUCN/CEESP/CMWG, Cenesta Tehran 146-187.
[110] Fabricius et al (2007) *Water Policy* 89; Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 65-66; Brandon K, Redford & Sanderson S "Introduction" in Brandon et al *Parks in Peril* (1998) 8-10.
[111] Eken G, Bennun L & Boyd C "Protected Areas Design and Systems Planning: Key Requirements for Successful Planning, Site Selection and Establishment of Protected Areas" in *Biodiversity Issues for Consideration in the Planning, Establishment and Management of Protected Area Sites and Networks* (2004) CBD Technical Series No.15, Secretariat of the Convention on Biological Diversity Montreal 37-42.
[112] Leach et al (1999) *World Development* 236-238 & 240.

homogenous, clear distinctions need to be drawn between communal rights holders and other stakeholders, with the former receiving preference in the subsequent negotiation process.[113] An additional contextual issue that needs to be understood are the different values, interests, concerns and motivations of these stakeholders for establishing the CCA.[114] These may be of a conflicting nature and any approach that 'downplays community differentiation' and seeks to treat local communities as a homogenous unit are 'inherently flawed'.[115]

One contemporary mechanism recently finding favour in the international conservation discourse to specifically promote the formulation of a collective and unified community position in advance of subsequent negotiations with conservation authorities and third parties in the context of CCAs, is the adoption of internal agreements[116] or community protocols.[117] These effectively comprise statements by local communities of their 'intentions to self-determine their futures' in respect of their land, natural resources and culture, which aim to inform subsequent engagement with third parties.[118]

[113] Cotula L, Odhiambo M, Orwa N & Muhanji A (eds) *Securing the Commons in an Era of Privatisation: Policy and Legislative Challenges* (2005) Securing the Commons Series No.10, IIED London 4; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 47.

[114] Borrini-Feyerabend G, Farvar M, Nguinguiri J & Ndangang V *Co-Management of Natural Resources: Organising, Negotiating and Learning-by-Doing* (2007) GTZ and IUCN, Kasparek Verlag Heidelberg 4; Kothari "Community Conserved Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 551-556; and Kothari A "Community Conserved Areas: Towards Ecological and Livelihood Security" (2006) 16(1) *Parks* 5-7.

[115] King B & Peravlo M "Coupling Community Heterogeneity and Perceptions of Conservation in Rural South Africa" (2010) 38 *Human Ecology* 278-279.

[116] Borrini-Feyerabend et al *Sharing Power. Learning by Doing in Co-Management* (2004) 172-177.

[117] See further: Jonas H, Shrumm H & Bavikatte K "Biocultural Community Protocols and Conservation Pluralism" in Shrumm H (ed) *Exploring the Right to Diversity in Conservation Law, Policy, and Practice* (2010) *IUCN-CEESP Policy Matters* Issue No.17, Tehran 102-112; Lassen B, Martin G & Rukundo O "Bio-Cultural Community Protocols and Protected Areas" in Bavikatte K & Jonas H (eds) *Bio-Cultural Community Protocols - A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (2009) Natural Justice & UNEP Montreal. The concept of community protocols, as opposed to bio-cultural community protocols, was specifically recognised in COP 10 (Nagoya, 2010) Decision X/41, (Elements of Sui Generis System for the Protection of Traditional Knowledge) para. 2.

[118] Bavikatte K & Jonas H "Bio-Cultural Community Protocols as a Community-Based Response to the CBD" in Bavikatte et al *Bio-Cultural Community Protocols* (2009) 22.

4.3 CONSULTATION AND NEGOTIATION

Such consultation and negotiation should be informed by the relevant factual context (articulated in the relevant studies) and based on the principles of equity, inclusivity, mutual respect, openness and transparency.[119] They should accordingly be: 'invited rather than imposed'; 'directed rather than directive'; and 'facilitative rather than manipulative'.[120] All stakeholders should be duly represented during these negotiations and should reciprocally share relevant information and advice with one another.[121] Given the diversity of interests and issues at play, it is essential that the interests of expediency do not outweigh the value of protracted and rigorous consultation and negotiation. In other words, 'the process is more important than the short-term product';[122] and it must be recognised that this process is never going to be 'a quick job'.[123] These negotiations are important in not only reaching consensus on the objectives for establishing the CCAs and the best form of governance for it, but also in: reconciling political and scientific imperatives; determining and building community identity; developing organisational and institutional capacity; improving communication; fostering human relationships and collaborative partnerships; and overcoming the trust deficit often prevalent between the relevant stakeholders.[124] This trust deficit is not only present between government authorities and the relevant community, but also within the community itself, and between the community and its neighbouring communities.[125] The

[119] Berkes "The Problematique of Community-Based Conservation" (2006) 6-7; Monu E "The Tragedy or Benefits of the Commons? Common Property and Environmental Protection" (2005) 9(1) *Botswana Journal of African Studies* 92; Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 9-10; and Brandon "Perils to Parks" in Brandon et al *Parks in Peril* (1998) 431-435.

[120] Martin R "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 22.

[121] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 40-42.

[122] Borrini-Feyerabend et al *Co-Management of Natural Resources* (2007) 4.

[123] Martin "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 9. See further: Hulme D & Murphree M "Community Conservation as Policy - Promise and Performance" in Hulme D & Murphree M (eds) *African Wildlife and Livelihoods, the Promise and Performance of Community Conservation* (2001) James Currey Oxford 296.

[124] Glavovic B "Resolving People-Park Conflicts Through Negotiation: Reflections on the Richtersveld Experience" (1996) 39(4) *Journal of Environmental Planning and Management* 495-502; Borrini-Feyerabend et al *Sharing Power. Learning by Doing in Co-Management* (2004) 210-221; Berkes "The Problematique of Community-Based Conservation" (2006) 8; and Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 547

[125] Borrini-Feyerabend G & Lassen B *Community Conserved Areas: A Review of State and Needs after Durban 2003 and CBD COP 7 2004* (2008) Preliminary Synthesis Report 16; and Kothari "Community

often highly politicised nature of these negotiations should furthermore be acknowledged. The negotiation process should accordingly provide necessary opportunities for conflicting interests to be aired and not seek to shroud these conflicting interests in overly technicist approaches to development planning.[126]

The government must provide contextually specific capacity building to strengthen all stakeholders' governance capacity, management capacity, legal capacity and accounting capacity to enable them to engage effectively in these negotiations.[127] It must furthermore ensure that all stakeholders have the requisite financial resources to prepare for and participate equitably in these negotiations.[128] These measures should seek to level the negotiation playing field and thereby promote the credibility of the outcome.[129] The government must finally ensure that the cultural identity and rights of the communities to manage, use, access and benefit from the natural resources situated within the CCA are duly acknowledged during these negotiations and reflected in an appropriate form in the ultimate agreement.[130]

During the consultation and negotiation process, due respect must be proffered to the traditional/indigenous institutions representing such communities and their decision-making mechanisms and processes.[131] As negotiations may reach an impasse, provision should be made for conflict resolution, preferably by way of readily accessible, low cost and locally situated mechanisms.[132] These processes need to be available to resolve potential conflicts between government authorities and communities, between

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Conserved Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 567-570.

[126] Steenkamp C & Uhr J *The Makuleke Land Claim: Power Relations and Community-Based Natural Resource Management* (2000) Evaluating Eden Series Discussion Paper No.18, IIED London 1.

[127] Borrini-Feyerabend et al *Community Conserved Areas: A Review of State and Needs* (2008) 23-24; Berkes "The Problematique of Community-Based Conservation" (2006) 8; Borrini-Feyerabend et al *Sharing Power. Learning by Doing in Co-Management* (2004) 164-170; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 11.

[128] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 544 & 547.

[129] Leach et al (1999) *World Development* 241.

[130] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 541; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 8.

[131] Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 10.

[132] Fabricius et al (2007) *Water Policy* 93; Ostrom E "Reformulating the Commons" (2002) *Ambiente & Sociedade* 11; Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 840-842; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 11.

constituent members of a community, and between neighbouring communities. Furthermore, given the extensive time and resources frequently invested in the consultation and negotiation process, it would be preferable for the resultant agreement to be of a satisfactory duration. An agreement of too short a duration may undermine the interests of long-term conservation, preclude substantial investments by the government and third parties with commercial interests, and engrain stakeholders in perpetual re-negotiations frequently fraught with political uncertainty.[133] Provision should nonetheless be made for the periodic review and amendment of the agreement where necessary. Such flexibility and adaptability is essential given that the establishment of these areas frequently constitute 'situations of social engagement, encounter and experimentation'.[134] The resultant agreement should accordingly be regarded as a more of a 'process than as a stable and definitive end point or product'.[135]

The contents of the agreement should be consistent with the country's broad conservation objectives as prescribed in relevant laws and policies.[136] It should furthermore clarify the parties' common objectives and commitment to establishing the area; their respective rights and obligations regarding managing, accessing and using the natural resources situated in the area; the anticipated land tenure and management regime; and the manner in which costs incurred and benefits derived from the area are equitably distributed between the parties.[137] When determining such content, care must be taken to ensure that the objectives and measures are clear, locally relevant, practical and realistic.[138]

[133] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 544.
[134] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 529; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* 46.
[135] Ibid.
[136] Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 7
[137] Fabricius et al (2007) *Water Policy* 89; Whande W, Kepe T & Murphree M *Local Communities, Equity and Conservation in Southern Africa: A Synthesis of Lessons Learnt and Recommendations from the Southern Africa Technical Workshop* (2003) PLAAS Bellville 15-16; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 7.
[138] Brandon "Perils to Parks" in Brandon et al *Parks in Peril* (1998) 417-418.

4.4 LAND TENURE

Communal land rights underpin CCAs. Their rise in prominence is frequently associated with local political activism and the recognition of indigenous people's tenure and resource rights.[139] Not surprisingly, establishing a CCA is in many jurisdictions associated with land reform initiatives seeking to afford communal land and resource rights to previously dispossessed communities. Secure communal tenure and genuine proprietorship of the natural resources situated in the area are frequently identified as necessary prerequisites for long enduring common-pool natural resource institutions[140] and CCAs.[141] Secure tenure also theoretically enables the communities to adopt a long-term approach to natural resource management.[142] The rights and obligations that underlie such tenure must be clearly defined so as to avoid potential confusion and conflict.[143]

Any land reforms seeking to promote communal tenure need to be carefully formulated. They need to give due recognition to the characteristics of pre-existing indigenous

[139] Anstey S & Rihoy L "Beacon & Barometer: CBNRM & Evolutions in Local Democracy in Southern Africa" in Mukamuri et al *Beyond Proprietorship* (2009) 41-47; Borrini-Feyerabend G & Kothari A *Recognising and Supporting Indigenous and Community Conservation - Ideas & Experiences From the Grassroots* (2008) IUCN/CEESP Briefing Note 9, Cenesta Tehran 15-16; and Blomley R, Nelson F, Martin A & Ngobo M *Community Conserved Areas: A Review of Status and Needs in Selected Countries of Central and Eastern Africa* (2007) Draft Report dated August 2007, prepared for TILCEPA, TGER, IUCN/CEESP, SwedBio & WCPA, 40.

[140] Roe D, Nelson F & Sandbrook C (eds) *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (2009) Natural Resource Issues No.18, IIED London 130; Cross-Sectoral Commons Governance In Southern Africa Project *Commons Governance in Southern Africa* (2009) Policy Brief No.28, PLAAS Bellville 2; Kothari A "Protected Areas and People: The Future of the Past" (2008) 17(1) *Parks* 31; Cotula et al *Securing the Commons in an Era of Privatisation* (2005) 4-5; Whande et al *Local Communities, Equity and Conservation in Southern Africa* (2003) 12; Murphree *Communities as Resource Management Institutions* (1992) 4-6 & 11; Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 87-92; Summers (1999) *Acta Juridica* 192; and Brandon "Perils to Parks" in Brandon et al *Parks in Peril* (1998) 429.

[141] Borrini-Feyerabend G *Strengthening What Works - Recognising and Supporting the Conservation Achievements of Indigenous Peoples and Local Communities* (2010) IUCN/CEESP Briefing Note 10, Cenesta Tehran 4; Borrini-Feyerabend G, Lassen B, Stevens S, Martin G, de la Peña J, Ráez-Luna E & Farvar M *Bio-Cultural Diversity Conserved by Indigenous Peoples and Local Communities – Examples and Analysis* (2010) Companion Document to IUCN/CEESP Briefing Note 10, Cenesta Tehran 33-34.

[142] Fabricius "Conservation and Communities - Learning from Experience" in Palmer et al *From Conflict to Negotiation* (2002) 260.

[143] Turner S, Collins S & Baumgart J *Community-Based Natural Resource Management: Experiences and Lessons in Linking Communities to Sustainable Resource Use in Different Social, Economic and Ecological Conditions in South Africa* (2002) Research Report No.11, PLAAS Bellville 6.

communal tenure regimes which have for centuries promoted sustainable resource management in many areas. These characteristics include: 'land and resource rights are directly embedded in a range of social relationship units'; these units are often 'multiple, overlapping and therefore "nested" or layered in character'; 'rights are inclusive rather than exclusive in character, being shared and relative'; 'rights are derived primarily from accepted membership of a social group'; 'these rights are 'both "communal" and "individual" in character'; 'access to land (through defined rights) is distinct from control of land (through system of authority and administration)'; control is 'often located within a hierarchy of nested systems of authority, with many functions located at local or "lower" levels'; and 'social, political and resource boundaries, while often relatively stable, are also flexible and negotiable to an important extent'.[144] They furthermore need to acknowledge the potential pitfalls of replacing these regimes with westernised notions of land-titling, which are often inappropriate to deal with rural communal property contexts.[145]

Conservation regimes (providing for the establishment of a CCA) and land reform regimes (providing for the restoration of communal land tenure and resource rights) are by their nature intertwined.[146] The implementation of these two regimes, often administered by separate authorities, should therefore be aligned. There is clearly no point in conservation authorities initiating a process to declare or recognise a CCA

[144] Cousins B "More than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy" (2007) 7(3) *Journal of Agrarian Change* 293. See generally on the nature of communal tenure: Cousins B "Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries" in Claassens A & Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) UCT Press Cape Town 109-137; Pienaar G "The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa" (2008) 2 *Stellenbosch Law Review* 260-261; Pienaar G "The Land Titling Debate in South Africa" (2006) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 441-442; Cousins B & Claassens A "Communal Land Rights, Democracy and Traditional Leaders in Post-Apartheid South Africa" in Saruchera M (ed) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (2004) PLAAS Bellville 139-158; and Cousins B "Reforming Communal Land Tenure in South Africa - Why the Draft Communal Land Rights Bill is not the Answer" (2002) 3(3) *ESR Review* 7-9.

[145] Cousins (2007) *Journal of Agrarian Change* 282 & 308-309; Pienaar (2006) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 437-439; Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resource Rights in Africa* (2004) 139 & 151-152; Saruchera M & Fakir S *Common Property Resources and Privatisation Trends in Southern Africa* (2004) Policy Brief - Debating Land Reform and Rural Development No.15, PLAAS Bellville; and Cousins (2002) *ESR Review* 7-9.

[146] Wynberg R & Sowman M "Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension" (2007) 50 (6) *Journal of Environmental Planning and Management* 785.

where the associated land reform process has not yet been initiated.[147] Those tasked with formulating and administering these regimes need to recognise that communal land reform beneficiaries frequently hold different forms of tenure such as full ownership, lease and other limited real rights.[148] Any successful CCA regime should recognise such diversity and provide a variety of tools to enable administrators and communities to tailor-make solutions best fitted to the nature of tenure rights held by the community. Finding such solutions may involve a complex web of authorities and take some time.[149] Provision may accordingly need to be made for interim management, access, use and benefit-sharing arrangements, pending the negotiation of formal agreements and/or the formal declaration of the area.[150]

4.5 DECLARATION

Having finalised the relevant agreements and land tenure arrangements, provision should be made for the formal declaration of the CCA. In the interests of openness and transparency, procedures should be put in place to ensure that all relevant stakeholders are properly informed of, and have an opportunity to participate in, the decision to establish a CCA.[151] The procedures should as a minimum include the publication of a notice in the relevant national, provincial and/or local media inviting comment. The content of the notice should contain information on the location of the area, the purpose for establishing the area, the proposed governance option and the anticipated management authority.[152] It should furthermore seek to clearly define the boundaries of the area as a whole, any access and resource use zones, and where several different authorities are afforded responsibility over different parts of the area, the boundaries of these decision-making units.[153]

[147] Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 10.
[148] Cotula et al *Securing the Commons in an Era of Privatisation* (2005) 4-5; and Brandon et al "Introduction" in Brandon et al *Parks in Peril* (1998) 13-14.
[149] See, for example, the complex web of authorities that have a role to play in the implementation of communally-conserved areas in South Africa (discussed in Chapter 5 (Part 3.3) and Chapter 6 (Part 5)).
[150] Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 9.
[151] Lausche B *Guidelines for Protected Areas Legislation* (2011) IUCN Environmental Law and Policy Paper No.81 IUCN Environmental Law Centre Bonn 52-62, 124-125, 139 & 188-190.
[152] Ibid.
[153] See Ostrom E *Governing the Commons: The Evolution of Institutions for Collective Action* (1990)

Provision should be made for the submission of final comments by all relevant stakeholders.[154] The nature and extent of comment forthcoming should provide a clear indication of the adequacy of the initial consultation and negotiation process. It therefore effectively operates as a safeguard to ensure that all stakeholders have been duly consulted and all stakeholder concerns duly considered. The initial agreement/s and declaration should be amended where necessary. Provision should thereafter be made for the formal declaration of the area by way of promulgation of a government notice. While this function would ordinarily lie with the national conservation authorities, it could be assigned or delegated to relevant provincial and municipal authorities where appropriate. The relevant statutory framework should also provide for the agreement/s to be registered against the title deeds of the properly to ensure its/their long-term protection.[155] Similar processes should also be prescribed for de-proclaiming or altering the boundaries of the CCA.[156]

4.6 INSTITUTIONS

A further key element is the need for representative, open and transparent institutions to oversee the CCA.[157] The requisite statutory framework should accordingly provide for the establishment of such institutions and prescribe their composition, powers and functions. These institutions could be administrative in nature (responsible for managing the area) and/or advisory in nature (responsible for providing advice to the administrative agency). Where a range of institutions have a role to play in a single area, prescribing mechanisms for promoting coordination and cooperation between them is essential.[158]

Cambridge University Press New York 90; and Ostrom (2002) *Ambiente & Sociedade* 10-11

[154] Lausche *Guidelines for Protected Areas Legislation* (2011) 188-190.

[155] Lausche *Guidelines for Protected Areas Legislation* (2011) 129-131, 191-193 & 214-216

[156] Lausche *Guidelines for Protected Areas Legislation* (2011) 191-193.

[157] Nelson et al (2008) *Development and Change* 575; Brechin et al (2002) *Society and Natural Resources* 46-49; and Agrawal A & Gibson C "Enchantment and Disenchantment: the Role of Community in Natural Resource Conservation' (1999) 27(4) *World Development* 641.

[158] Fabricius "Conservation and Communities - Learning from Experience" in Palmer et al *From Conflict to Negotiation* (2002) 261.

Any regime which excludes community representation on these institutions and participation within their decision-making processes is unlikely to be sustainable.[159] Clear procedures should be prescribed to facilitate communication between community representatives and their constituency.[160] Provision for the inclusion of traditional leaders, although often proving a difficult exercise, is an important element for ensuring the long-term success of such institutions.[161] The nature of community representation will vary according to the nature of the institutions involved and the form of governance underpinning the CCA.[162] Where the principal management function is assigned to a government authority, the inclusion of a degree of community representation in the decision-making structures of such an authority may suffice. Where some collaborative form of governance is anticipated, the community representation will ordinarily need to be far more extensive and the decision-making processes more clearly defined.[163] This may entail the formation of co-management boards or similar institutions comprising of equal representation of government officials and community members. Where this is the case, it is valuable to note the following traits acknowledged as central to effective and sustainable co-management institutions: their form and membership should be negotiated not imposed; they operate optimally when they are 'small, internally diverse, and fully accountable'; and the overarching regime should provide a fine balance between flexibility and clearly defined roles, responsibilities and decision-making processes.[164] No matter what the governance option, the inclusion of community representation on relevant advisory institutions hold potential for providing a continued role for traditional authorities; ensuring that community interests remain central to

[159] Khotari A, Menon M & O'Reilly S *Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs): How Far Do National Laws and Policies Recognise Them?* (2010) Preliminary Report dated October 2010, prepared for IUCN/CEESP, TILCEPA, WCPA and Kalpavriksh, 12; Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 547; and Monu (2005) *Botswana Journal of African Studies* 91.
[160] Lausche *Guidelines for Protected Areas Legislation* (2011) 166-173.
[161] Cross-Sectoral Commons Governance In Southern Africa Project *Commons Governance in Southern Africa* (2009) 2.
[162] For a full discussion on these forms of governance and the factors impacting on them see Chapter 2 (Part 3.3.5).
[163] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 529 & 534.
[164] Borrini-Feyerabend et al *Sharing Power. Learning by Doing in Co-Management* (2004) 278-295; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 47.

decision-making; and that relevant indigenous knowledge, customary law and traditional resource management practices are integrated into the area's management regime.

When forming these institutions, regard must be had to the nested, overlapping and frequently competing nature of communal resource rights and how these traits manifest in the often diverse institutions traditionally responsible for their administration.[165] In many contexts, it may be problematic to coerce all relevant communal institutions to sit on one body where their interests are varied and competing or to effectively straightjacket communal institutions into predetermined standard 'institutional types'.[166] It may be preferable to recognise issues of scale and divide these institutions into smaller decision-making units; assign them different functions; and provide mechanisms to enable them to interact with one another where necessary.[167] When doing so, care must be taken to define the boundaries of these decision-making units clearly.[168] Furthermore, when selecting community members to participate in these decision-making units or larger institutions, clear distinctions must be drawn again between communal rights holders and stakeholders, with the former receiving preference.[169] Where necessary, steps must be taken to ensure that community members are capacitated to enable them to actively participate in these institutions and that the communities' internal governance structures are sufficiently robust and democratic to enable them to adapt to new internal and external pressures brought to bear on them.[170] Provision must be made to enable the composition and nature of these institutions to adapt to changing circumstances as communities, their environment and their needs

[165] Ostrom E (2002) *Ambiente & Sociedade* 11-12; and Agrawal et al (1999) *World Development* 633-636.
[166] Borrini-Feyerabend et al *Recognising and Supporting Indigenous and Community Conservation* (2008) 21.
[167] Fabricius et al (2007) *Ecology & Society* 29, Berkes "The Problematique of Community-Based Conservation" (2006) 8-9; and Whande et al *Local Communities, Equity and Conservation in Southern Africa* (2003) 12.
[168] Ostrom *Governing the Commons* (1990) 90; and Ostrom (2002) *Ambiente & Sociedade* 10-11.
[169] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 47.
[170] Binot A, Blomley T, Coad L, Nelson F, Roe D & Sandbrook C "What has CBNRM Achieved in Africa? The '3E's' - Empowerment, Economic, Environment' in Roe D, Nelson F & Sandbrook C (eds) *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (2009) Natural Resource Issues No.18, IIED London, 55-63; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 43-44.

are infrequently static.[171] As in the process leading up to their establishment, conflict-resolution procedures should be prescribed to resolve conflicts both between conservation authorities and the communities, and between constituent parts of a community.[172] Finally, in giving effect to the several principles of good governance for protected areas distilled during the course of the past five years,[173] the decision-making processes adopted by all the above institutions must be based on the principles of fairness, equity, transparency and accountability.[174]

4.7 MANAGEMENT

As highlighted above, the form of management governing the CCA needs to be collaboratively determined and clearly defined.[175] It may vary from sole management (by either the government or the community) to several forms of collaborative management (ordinarily between the government and the community or between several community institutions). Irrespective of the form of management, a management authority needs to be designated for the area and its powers and functions clearly delineated. The requisite legal framework should further provide for generally accepted management tools such as the preparation of management plans; the prescription of internal rules and zoning; and the imposition of monitoring and reporting obligations on

[171] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 544 & 548; Brown (2003) *Global Ecology & Biogeography* 91; and Leach et al (1999) *World Development* 229-230.

[172] Fabricius et al (2007) *Water Policy* 93; Ostrom (2002) *Ambiente & Sociedade* 11; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 11.

[173] *Programme of Work on Protected Areas* (adopted at COP 7 of the *Convention on Biological Diversity* held in Kuala Lampur in 2004 and annexed to COP 7 Decision VII/28) specifically requests parties to 'consider governance principles, such as the rule of law, decentralization, participatory decision-making mechanisms for accountability and equitable dispute resolution institutions and procedures' (Programme Element 1, Goal 3, para. 3.1.4). See further on the notion of good governance within protected areas: Dudley N (ed) *Guidelines for Applying Protected Area Management Categories* (2008) IUCN Gland 28; Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 17-18; and Graham J, Amos B & Plumptre T. *Governance Principles for Protected Areas in the 21st Century* (2003) A Discussion Paper, Institute on Governance, Parks Canada and CIDA Ottawa, 7-10.

[174] Binot et al "What has CBNRM Achieved in Africa" in Roe et al *Community Management of Natural Resources in Africa* (2009) 55-63; Borrini-Feyerabend et al *Co-Management of Natural Resources* (2007) 3-4, Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 538; and Whande et al *Local Communities, Equity and Conservation in Southern Africa* (2003) 17.

[175] Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 10.

the management authority.[176] Traditional knowledge and management practices should be acknowledged and integrated into the management regime where appropriate.[177] Efforts should furthermore be made to link or engrain the communities' culture with the management regime,[178] thereby affording recognition to, or promoting the development of, cross-cultural communal stewardship ethics.[179]

When formulating the requisite management regime, care must be taken to ensure that the measures are locally relevant, realistic and verifiable.[180] Provision should be made for them to be relatively flexible, thereby enabling them to respond to changing circumstances and needs.[181] Adaptive management[182] and 'dynamic governance'[183] are generally favoured to 'straitjacket approaches'[184] and narrow 'packaged prescription'.[185] Such flexibility and adaptability could be achieved practically, for example, by providing for the periodic review of a management plan, altering the composition of a management authority and even terminating a management authority's mandate where

[176] For a general discussion of the principles of good protected areas management planning, see: Lockwood M "Management Planning" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 551.
[177] Kothari et al *Territories and Areas Conserved by Indigenous Peoples and Local Communities* (2010) 11; Cross-Sectoral Commons Governance In Southern Africa Project *Commons Governance in Southern Africa* (2009) 2; Berkes F "Community Conserved Areas: Policy Issues in Historic and Contemporary Context" (2009) 2 *Conservation Letters* 22; Kothari (2008) *Parks* 31; Kothari "Community Conserved Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 572; Monu (2005) *Botswana Journal of African Studies* 91; Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 44; and Brown (2003) *Global Ecology & Biogeography* 90.
[178] Fabricius et al (2007) *Ecology & Society* 29.
[179] Berkes (2004) *Conservation Biology* 628.
[180] Brandon "Perils to Parks" in Brandon et al *Parks in Peril* (1998) 428.
[181] Kothari et al *Territories and Areas Conserved by Indigenous Peoples and Local Communities* (2010) 11, Martin "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 11; Berkes (2009) *Conservation Letters* 23; Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 529 & 534; and Kothari "Community Conserved Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 572.
[182] Berkes (2009) *Conservation Letters* 23; Fabricius et al C (2007) *Ecology & Society* 29; and Borrini-Feyerabend et al *Co-Management of Natural Resources* (2007) 5-6.
[183] Martin "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 11.
[184] Borrini-Feyerabend et al *Community Conserved Areas: A Review of State and Needs* (2008) 15.
[185] Berkes (2009) *Conservation Letters* 22. See further: Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 46.

it fails to fulfil its obligations. Mechanisms promoting clear and frequent communication between all stakeholders should facilitate an adaptive management approach.[186]

Decentralisation and the devolution of the management authority to the communal institutions is a frequently stated ideal.[187] It must be remembered, however, that the allocation of 'authority without responsibility is likely to be dysfunctional or obstructive' and that similarly the allocation of 'responsibility without authority lacks the necessary instrumental and motivational components for its efficient exercise'.[188] The devolution of such authority and/or responsibility should ideally be to 'nested sets' of communal institutions at 'different levels of scale'.[189] Care must be taken to ensure that these communal institutions are suitably empowered, capacitated and supported; that such decentralisation does not lead to unnecessary fragmentation; and that the requisite safeguards are in place to ensure accountability and transparency.[190] Given the capacity and resource constraints of many communities, collaborative forms of management are frequently favoured. These often comprise of some form of co-management regime where authority for the management of the area is shared between one of more community and government authorities. It has been argued that the following four conditions are prerequisites for the success of this form of governance: the existence of appropriate institutions; the prevalence of trust between the respective parties; the recognition and protection of community rights of access and use; and the provision of economic incentives to those communal institutions partner to the co-

[186] Fabricius et al (2007) *Water Policy* 90.
[187] Kothari et al *Territories and Areas Conserved by Indigenous Peoples and Local Communities* (2010) 3; Blomley et al *Community Conserved Areas: A Review of Status and Needs in Selected Countries of Central and Eastern Africa* (2007) 40; Hoole *Lessons from the Equator Initiative* (2007) 1; Berkes (2004) *Conservation Biology* 625-626; Whande et al *Local Communities, Equity and Conservation in Southern Africa* (2003) 17; Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 9-10; and Summers (1999) *Acta Juridica* 193.
[188] Martin "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 15.
[189] Martin "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 16.
[190] Spierenburg M, Steenkamp C & Wels H "Enclosing the Local for the Global Commons: Community Land Rights in the Great Limpopo Transfrontier Conservation Area" (2008) 6(1) *Conservation & Society* 87. See further: Ribot J "Representation, Citizenship and the Public Domain of Democratic Decentralisation" (2007) 50(1) *Development* 43-49; and Ribot J & Larson A (eds) *Decentralisation of Natural Resources: Experiences in Africa, Asia and Latin America* (2005) Frank Cass London.

management arrangement.[191] Recent commentators have added the following to the list: pluralism; communication and negotiation; transactive decision-making; social learning; and shared action or commitment.[192]

The majority of these elements similarly underpin the success or failure of CCAs in general. However, given that this form of governance involves distributing management across two or more institutions, it is imperative to provide clarity on the respective rights and obligations of the partner institutions.[193] It is furthermore essential to clearly delineate the composition of the decision-making bodies (the number of representatives from each institution; the qualification criteria and the method for electing/appointing them) and the decision-making process (by consensus or majority vote).[194] Finally, the need for real as proposed to fictional participation – true cooperation as opposed to cooption and coercion – has been identified as an additional key to well-functioning co-management regimes. [195]

4.8 ACCESS, USE AND BENEFIT-SHARING

One of the central tenets of the contemporary approach to conservation is that seeking to promote resource management without simultaneously providing for resource use 'is likely to be futile'.[196] Any conservation regime that aims to exclude access and use rights, effectively promotes conservation at the expense of local communities, and may ultimately lead to a vicious circle of encroachment and unsustainable use.[197] Provision

[191] Berkes "New and Not-so-New Directions in the Use of the Commons: Co-Management" (1997) 42 *The Common Property Resource Digest* 6; and Kepe T "Land Claims and Comanagement of Protected Areas: Exploring the Challenges" (2008) 41 *Environmental Management* 316-318.
[192] Plummer R & Fitzgibbon J "Co-Management of Natural Resources: A Proposed Framework" (2004) 33(6) *Environmental Management* 879-881.
[193] Borrini-Feyerabend et al *Community Conserved Areas: A Review of State and Needs* (2008) 25; and Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 548.
[194] Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 529 & 534.
[195] Kothari (2008) *Parks* 31; and Brown (2003) *Global Ecology & Biogeography* 89.
[196] Murphree *Communities as Resource Management Institutions* (1992) 12; Fabricius et al (2007) *Water Policy* 89; and Martin "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 10.
[197] Berkes "The Problematique of Community-Based Conservation in a Multi-Level World" (2006) 3-5.

should ideally therefore be made in all CCA regimes for some form of access and use rights, and the equitable sharing of the benefits and costs associated with the area.[198] There should, where possible, be a direct correlation or congruence between inputs/costs and benefits; with differential inputs attracting differential benefits.[199] When considering the potential benefits, care must be taken not to explore only the economic benefits such as prospective employment opportunities, gate fees and tourism concession levies. The notion of benefits should be more broadly defined and 'encompass the meaning of land, culture, social and symbolic relations'.[200] In this sense, potential benefits would include rights of access for the purpose of small-scale agriculture, hunting, grazing, medicinal plant collection, and spiritual and cultural purposes; the formal recognition of traditional land and resource rights; and the ability to participate in decision-making.[201] These benefits should preferably be agreed upon in advance and recorded in the agreement/s underpinning the CCA. In the interest of flexibility and adaptability, these benefits should similarly be the subject of temporal review and renegotiation.[202] Measures also need to be put in place to ensure that access to the opportunities and benefits stemming from the CCA is transparent and not skewed in favour of well-placed local political elites.[203]

4.9 FINANCING AND SUPPORT

Following the establishment of the CCA, the government must assess whether those tasked with managing it have the requisite capacity, financing and support to do so.[204] Where capacity constraints are ascertained, contextually specific, appropriate, long-

[198] Kothari (2008) *Parks* 31; Kothari "Collaboratively Managed Protected Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 538; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 11.
[199] Ostrom (2002) *Ambiente & Sociedade* 11; and Murphree *Communities as Resource Management Institutions* (1992) 4-6.
[200] Whande et al *Local Communities, Equity and Conservation in Southern Africa* (2003) 17. See further: Berkes (2004) *Conservation Biology* 626-627; Monu (2005) *Botswana Journal of African Studies* 90; Cotula et al *Securing the Commons in an Era of Privatisation* (2005) 3-4.
[201] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 42.
[202] Whande et al *Local Communities, Equity and Conservation in Southern Africa* (2003) 17.
[203] Binot et al "What has CBNRM Achieved in Africa" in Roe et al *Community Management of Natural Resources in Africa* (2009) 57-74; and Borrini-Feyerabend et al *Sharing Power. Learning by Doing in Co-Management* (2004) 337.
[204] Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 11.

term and flexible capacity-building programmes should be implemented.[205] These programmes should promote 'learning-by-doing' by all stakeholders, including government authorities.[206]

These capacity-building initiatives will not alone ensure the sustainability of the CCA. They need to be accompanied by the provision of appropriate incentives and resources to encourage their formation and fund their management.[207] Financing is a perpetual problem facing all forms of protected areas.[208] By far the majority of protected areas are not financially self-sufficient and rely on external funding from foreign and domestic sources. This problem is often exacerbated in the context of CCAs, areas that are frequently tasked with fulfilling not only conservation objectives, but also simultaneously socio-economic imperatives. The government should therefore seek to create an enabling policy and legislative environment for implementing a broad array of tools for ensuring the financial sustainability of CCAs[209] and providing opportunities for private sector investment.[210] Those tools currently receiving international attention include:[211] economic incentives;[212] environmental funds;[213] debt-for-nature swaps;[214] biodiversity

[205] Borrini-Feyerabend et al *Community Conserved Areas: A Review of State and Needs* (2008) 23-24; and Whande et al *Local Communities, Equity and Conservation in Southern Africa* (2003) 17.
[206] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 49.
[207] Martin "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri et al *Beyond Proprietorship* (2009) 11; Fabricius et al (2007) *Water Policy* 90 & 93; Berkes (2004) *Conservation Biology* 626-627.
[208] Emerton L, Bishop J & Thomas L *Sustainable Financing of Protected Areas: A Global Review of Challenges and Options* (2006) Best Practice Protected Areas Guidelines Series No.13, IUCN Gland 5-15.
[209] Borrini-Feyerabend et al *Community Conserved Areas: A Review of State and Needs* (2008) 24; Kothari A "Community Conserved Areas" in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 571-572; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 11.
[210] Cotula et al *Securing the Commons in an Era of Privatisation* (2005) 6.
[211] For a full discussion of these tools see: Emerton et al *Sustainable Financing of Protected* (2006) 25-72; Lockwood M & Quintela C "Finance and Economics' in Lockwood et al *Managing Protected Areas - A Global Guide* (2006) 331-337.
[212] Economic incentives seek (through the grant of tax rebates, reductions and exemptions) to encourage various activities such as: contracting land into protected areas; managing protected areas; and donating money or land to protected areas.
[213] Environmental funds are generally created by large once-off contributions from donor agencies and replenished from various sources such as private sector contributions, fiscal revenues and earnings from charges for goods and services in protected areas. The income from the fund is earmarked for spending on protected areas.
[214] Debt-for-nature swaps are a mechanism by which public debt is purchased at a discount by an outside agency (often an international NGO) and redeemed in exchange for government commitments to fund conservation activities often through the establishment of a trust fund.

offset schemes;[215] benefit-sharing and revenue-sharing schemes;[216] contracting private investment;[217] investment, credit and enterprise funds;[218] resource extraction fees;[219] bio-prospecting charges;[220] payments for ecosystem services;[221] and most recently climate change incentive schemes given the general role played by protected areas in climate change mitigation and adaptation.[222] The requisite safeguards must however be prescribed to ensure that funding directly allocated to CCAs is administered in an equitable and accountable manner; local communities do not entirely abandon their existing livelihoods; and that the above financing tools do not result in perverse outcomes.[223] Care must also be taken to ensure that local communities are not subject to abuse by private investors when concluding any community-public-private partnerships. Several commentators sceptically view such schemes as a means by which the private sector secures, or effectively privatises, large tracts of natural

[215] Biodiversity offsets are '…conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to ensure no net loss of biodiversity' (Ten Kate K, Bishop J & Bayon R, *Biodiversity Offsets: Views, Experience, and the Business Case* (2004) IUCN Gland and Insight Investment London, 6).

[216] Benefit-sharing and revenue-sharing schemes take many different forms but are based on the premise that creating mechanisms to allow local communities to participate in and benefit financially from conservation will offset the local opportunity and other social costs associated with the establishment of protected areas.

[217] This involved contracting the management of protected areas to private groups, companies and individuals through commercial and lease agreements.

[218] Biodiversity enterprise funds are funds that provide long-term capital, typically combined with technical advice, to commercial ventures based on the conservation or sustainable use of biodiversity. These ventures are typically small-and-medium scale and engaged in activities that contribute to conservation such as: eco-tourism; sustainable forestry; and harvesting of wild food products.

[219] These would include fees for harvesting, processing and selling products derived from protected areas and can range from royalties and concession fees to large-scale extractive operations such as mining.

[220] The commercial potential of biological resources is on the rapid increase. Numerous of these resources are situated within the boundaries of protected areas and the use of up-front payments, royalties and profit-sharing agreements associated with any bio-prospecting could raise significant funding.

[221] Protected areas provide many 'ecosystem services' to people such as water filtration, resource generation and carbon sequestration. Systems of payment for these ecosystem services seek to create financial incentives for resource users to adopt voluntary activities and technologies that generate environmental goods. These can take the form of payments to private landowners who adopt low-impact land-uses to the sale of carbon credits on the international market.

[222] See further: Dudley N, Stolton S, Belokurov A, Krueger L, Lopoukhine N, MacKinnon K, Sandwith T & Sekhran N (eds) *Natural Solutions: Protected Areas Helping People Cope with Climate Change* (2010) IUCNWCPA, TNC, UNDP, WCS, World Bank & WWF; Gland, Switzerland, Washington DC & New York, 78-86.

[223] Cross-Sectoral Commons Governance In Southern Africa Project *Commons Governance in Southern Africa* (2009) 2-3; Borrini-Feyerabend et al *Recognising and Supporting Indigenous and Community Conservation* (2008) 25-26; and Borrini-Feyerabend et al *Community Conserved Areas: A Review of State and Needs* (2008) 24.

resources, levering control from the very local communities dependent on them for their livelihood.[224]

Financial support is but one form of support and frequently the non-financial benefits for communities are more significant.[225] The government could consider supplementing the above measures with several non-financial forms of support. First, it could initiate publicity campaigns to assist local communities to gain social recognition through raising general public awareness of their rights, values and practices; and highlighting the valuable role they play in natural resource management.[226] Secondly, it could take measures to strengthen the cultural identity of local communities.[227] Thirdly, it could assist communities in strengthening their communal property institutions and traditional structures, including promoting the values of equity, diversity, democracy and accountability.[228]

5. CONCLUSION

Within this chapter I sought to introduce and define the concept of CCAs. I proposed that this concept provides a more workable lens than the IUCN protected area governance paradigm, through which to describe, plan for and evaluate the exceedingly diverse efforts to conserve common-pool natural resources through communal property regimes. I further surveyed the trends inherent in recent economic, property rights, ecology, human rights and protected areas dialogues which have contributed to the tectonic shift in conservation ideology – a shift from conventional protectionist, exclusionary, state-centred approaches to contemporary inclusive, participatory, human-centred approaches. I illustrated how this shift has led to the rise in prominence of CCAs and how current debates focus less on the merits of the conventional versus

[224] Spierenburg et al (2008) *Conservation & Society* 89-90; Fakir S *Globalisation and its Influence on Poverty and Environment* (2004) Policy Think Tank Series No.17, IUCN-ROSA Harare; and Dzingirai V "The New Scramble for the African Countryside" (2003) 34(2) *Development & Change* 243-263.
[225] Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 838.
[226] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 75-76; and Beltran *Indigenous and Traditional Peoples and Protected Areas* (2000) 11
[227] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 84-87.
[228] Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 78 & 81-83.

contemporary approach, and more on the elements that promote its successful implementation. I thereafter drew from relevant discourses to distil a series of elements that I argue should underpin any regime seeking to provide for CCAs. I arranged these elements under a series of themes, namely: types of CCAs; land tenure; planning; consultation, negotiation and declaration; institutions; management; access, use and benefit-sharing; and financing and support.

Having defined the concept of CCAs and having distilled the elements that theoretically underlie their successful implementation, I am now in a position to initiate my evaluation of the extent to which South Africa's legal framework provides for their use as a tool for bridging the country's conservation and land reform agendas.

PART II

THE LAW

Having distilled the objective, nature and form of communally-conserved areas in Part I of the dissertation, Part II considers the manner in which South Africa's legal framework provides for their domestic introduction. This is no simple task. The requisite domestic legal framework sits somewhat uncomfortably between two legal domains, namely conservation and land reform, which have both undergone significant transformation in the past decade or so. Numerous different institutions oversee the administration of these legal domains. Their actions are in turn informed by a diverse array of domestic policies and programmes. Furthermore, overarching these two legal domains is South Africa's comprehensive constitutional dispensation. It provided the mandate for, and framework within which, the contemporary conservation and land reform legislation was formulated and is implemented. Part II is divided into four chapters. Commencing from the broadest perspective, Chapter 4 (titled *South Africa's Constitutional Regime of Relevance to Communally-Conserved Areas*) examines South Africa's constitutional dispensation, specifically the relevant constitutional rights it grants citizens and the relevant competences it affords the different spheres of government to make and administer laws of relevance to communally-conserved areas. Chapter 5 (titled *South Africa's Conservation Regime of Relevance to Communally-Conserved Areas)* considers South Africa's conservation laws, policies and institutions that respectively inform, provide for and administer communally-conserved areas. Chapter 6 (titled *South Africa's Land Reform Regime of Relevance to Communally-Conserved Areas)* comprises of a similar examination of the domestic laws, policies and institutions at play in South Africa's land reform regime. Integrated within both Chapter 5 and Chapter 6, is a critical analysis of the factors which have shaped South Africa's contemporary conservation and land reform regimes, and which have similarly influenced the domestic implementation of communally-conserved areas. Chapter 7 (titled *Linking South Africa's Conservation and Land Reform Regimes*) concludes this part of the dissertation by surveying recent domestic efforts in the context of communally-conserved areas to traverse the artificial and dysfunctional divide between South Africa's conservation and land reform imperatives.

CHAPTER 4

SOUTH AFRICA'S CONSTITUTIONAL REGIME OF RELEVANCE TO COMMUNALLY-CONSERVED AREAS

1. INTRODUCTION

The Constitution of the Republic of South Africa[1] (the Constitution) is the supreme law of South Africa, to which all law and conduct is subject.[2] To the extent that any law or conduct is inconsistent with the Constitution, it is invalid.[3] From the perspective of communally-conserved areas (CCAs), the Constitution is significant for the following three main reasons. First, it elevates an array of concerns to the status of fundamental human rights. The most relevant of these concerns in the context of CCAs are the environment, property, administrative justice, access to information and access to justice. Secondly, it confirms the standing of customary law and institutions in South Africa's legal dispensation. Thirdly, it prescribes the competence of the different spheres of government (national, provincial and local) to make and administer laws of relevance to CCAs. While a comprehensive examination of these three issues falls outside the ambit of this dissertation, they do warrant a brief consideration as they have provided the impetus and foundation for a diverse array of domestic laws, plans and programmes which have arisen in the past two decades of direct relevance to CCAs.

2. CONSTITUTIONAL RIGHTS

2.1 ENVIRONMENTAL RIGHT

Perhaps the most significant step in the development of South Africa's contemporary environmental regime, and therefore its conservation regime, has been the inclusion of

[1] Constitution of the Republic of South Africa, 1996.
[2] Section 2.
[3] Section 1.

an environmental right in the Bill of Rights chapter of the Constitution.[4] Section 24 provides that:

> 'Everyone has the right –
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

While the grant in section 24(a) of a classic first generation right to all citizens is noteworthy and has significantly raised the status of environmental issues in South Africa, it is the second part of the environmental right enshrined in section 24(b) which is probably of more significance in the context of CCAs. It imposes a duty on the Government to, amongst other things, 'promote conservation' and 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Clearly evident in these sentiments are elements of the tectonic shift in the conservation discourse discussed in Chapter 3 above. These include recognition of both 'conservation' and 'sustainable use' as integral and mutually supportive components of any environmental regime; and the acknowledgment of the socio-economic context within which these ideals should be promoted and secured.

[4] For a general discussion on the environmental right, see: Feris L "Constitutional Rights and Locus Standi" in Paterson A & Kotze L (eds) *Environmental Compliance and Enforcement in South Africa* (2009) Juta & Co Ltd Cape Town 129-151; Feris L "Constitutional Environmental Rights: An Underutilised Resource" (2008) (24(1) *South African Journal on Human Rights* 29-49; Glazewski J "The Environmental Right" in Cheadle H, Davis D & Haysom N *South African Constitutional Law: The Bill of Rights* (2nd Ed) (2005) Butterworths Durban 19(1)-19(30); Glazewski J *Environmental Law in South Africa* (2nd Ed) (2005) Lexis Nexis Butterworths Cape Town 65-102; Winstanley T "Entrenching Environmental Protection in the New Constitution" (1995) *South African Journal of Environmental Law & Policy* 85-97. The pre-eminence of the environmental right has similarly been recognised by the judiciary in several cases, including: *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and the Environment, Mpumalanga Province* 2007 (6) SA 4 (CC); *MEC for Agriculture v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (WLD); *The Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 SCA; and *Minister of* Health *& Welfare v Woodcarb Ltd* 1996 (3) SA 155 (N).

Heeding this duty, South Africa's national environmental authorities have recently overhauled the nation's protected areas and biodiversity regimes through the promulgation of the National Environmental Management: Protected Areas Act[5] and the National Environmental Management: Biodiversity Act.[6] Several provincial authorities have followed suit and promulgated new conservation laws.[7] These contemporary national and provincial conservation regimes provide the statutory framework for the domestic establishment, management and regulation of CCAs.

The interventions of national and provincial conservation authorities have not however been limited to the statutory context. Owing to the breadth of their constitutional duty to include 'reasonable legislative and other measures', national and provincial authorities have also introduced a number of policies, plans and programmes relevant to CCAs. These include in chronological order: *Guidelines for the Implementation of Community-Based Natural Resource Management in South Africa*;[8] *Stewardship Programmes;*[9] the *People and Parks Programme;*[10] *National Biodiversity Strategy and Action Plan;*[11] the *National Protected Areas Expansion Strategy;*[12] and the *National Co-Management Framework*.[13] The manner in which these laws, policies, plans and programmes provide for and facilitate the domestic implementation of CCAs in South Africa is considered in detail in Chapter 5 (Part 3.2) below.

[5] Act 57 of 2003.
[6] Act 10 of 2004.
[7] These provincial laws include: Provincial Parks Board Act (Eastern Cape) (12 of 2003); Limpopo Environmental Management Act (7 of 2003); Limpopo Tourism and Parks Board Act (8 of 2001); Mpumalanga Nature Conservation Act (10 of 1998); Kwazulu-Natal Nature Conservation Management Act (9 of 1997); Mpumalanga Parks Board Act (6 of 1995).
[8] Department of Environmental Affairs and Tourism *Guidelines for the Implementation of Community-Based Natural Resource Management (CBNRM) in South Africa* (2003). For a discussion of these *Guidelines*, see: Chapter 5 (Part 3.2.1).
[9] For a discussion of these Progammes, see: Chapter 5 (Part 3.2.2).
[10] For a discussion of this Programme, see: Chapter 5 (Part 3.2.3).
[11] Department of Environmental Affairs and Tourism *South Africa's National Biodiversity Strategy and Action Plan* (2005). For a discussion of this Strategy, see: Chapter 5 (Part 3.2.5).
[12] Government of South Africa *National Protected Areas Expansion Strategy for South Africa 2008* (2009). For a discussion of this Strategy, see: Chapter 5 (Part 3.2.6).
[13] Department of Environmental Affairs *National Co-Management Framework* (2010). For a discussion of this Framework, see: Chapter 7 (Part 2.2).

2.2 PROPERTY CLAUSE

As the environmental right has been central in shaping the country's conservation regime, the inclusion of a property right in the Constitution could similarly be argued to be the most significant step in the development of South Africa's contemporary land regime.[14] Whilst not affording citizens a positive right to property, section 25 provides for both the deprivation[15] and expropriation[16] of property. The meaning of 'property' is 'not limited to land'[17] and therefore in the context of CCAs, crucially includes limited real rights in property such as rights of access and use.

It is however the provisions in the latter half of the property clause which are most relevant to recent reforms in the domestic communal land tenure regime, and accordingly to CCAs. Section 25(5) places a duty on the Government to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'. Section 25(6) entitles any person or community whose 'tenure of land is legally insecure as a result of past racially discriminatory law or practices' to secure legal tenure or 'comparable redress'. Finally section 25(7), read together with section 25(8), entitles any person or community dispossessed of property after 19 June 1913 through 'past racially discriminatory laws and practices' to the restitution of such property or to 'equitable redress'; and furthermore enables the Government to take 'legislative and other measures ... to achieve reform, in order to redress the results of past racial discrimination'. These three aspects of the property right respectively provide the

[14] See generally: Van der Walt A *Constitutional Property Law* (2005) Juta & Co Ltd Cape Town; Roux T & Davis D "Property" in Cheadle et al *South African Constitutional Law* (2nd Ed) (2005) 20(1)-20(28); Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd Ed) (2002) Juta & Co Ltd Cape Town 46(1)-46(37); and Mostert H & Badenhorst P "Property and the Bill of Rights" in *Bill of Rights Compendium* (1996) 3FB1-3FB124.

[15] Section 25(1) provides that, 'No one may be deprived of property except in terms of a law of general application, and no such law may permit the arbitrary deprivation of property'.

[16] Section 25(2) provides for the expropriation of property 'in terms of a law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation...'. Such compensation must be 'just and equitable' and the factors for determining what is 'just and equitable' are set out in section 25(3).

[17] Section 25(4)(b).

constitutional foundation for the three main components of South Africa's land reform programme, namely: land redistribution; land tenure reform; and land restitution.[18]

Heeding their constitutional duty to provide the requisite legal framework for implementing this programme, the national authorities have promulgated a diverse array of laws in the past couple of decades, the most important of which include in chronological order: Land Titles Adjustment Act;[19] Provision of Land and Assistance Act;[20] Restitution of Land Rights Act;[21] Land Administration Act;[22] Communal Property Association Act;[23] Interim Protection of Informal Land Rights Act;[24] Extension of Security of Tenure Act;[25] Transformation of Certain Rural Areas Act;[26] and Communal Land Rights Act.[27] The relevance of these programmes and laws to the domestic implementation of CCAs is considered in detail in Chapter 6 below.

2.3 OTHER RELEVANT RIGHTS

Several additional rights are of tangential relevance to CCAs. The promotion of open and accountable governance relating to their establishment and management is facilitated through the inclusion of a right of access to information and a right to just administrative action. Provision for the resolution of disputes relating to their establishment and management is guaranteed through the grant of liberal legal standing and a right of access to the courts.

Section 32 affords everyone a right of access to information held by the Government and information that is held by any other person which is required for the exercise or

[18] For a discussion of this programme, and the laws and policies that have been implemented to give effect to it, see: Chapter 6.
[19] Act 111 of 1993.
[20] Act 126 of 1993.
[21] Act 22 of 1994.
[22] Act 2 of 1995.
[23] Act 28 of 1996.
[24] Act 31 of 1996.
[25] Act 62 of 1997.
[26] Act 94 of 1998.
[27] Act 11 of 2004.

protection of any constitutional right.[28] In compliance with its constitutional obligation to introduce national legislation to give effect to the right,[29] the Government has promulgated the Promotion of Access to Information Act[30] that regulates access to information held by both 'public bodies'[31] and 'private bodies'.[32] It imposes strict obligations on these bodies to provide access to certain types of information held by them and prescribes detailed access procedures.[33] Both public and private bodies must generally give the public access to information held by them unless it falls within one of the prescribed grounds of refusal.[34] Cumulatively, the above regime affords communities and authorities the means to obtain information from each other of relevance to the establishment and management of CCAs.

Section 33 grants everyone a right to 'administrative action'[35] that is 'lawful, reasonable and procedurally fair'.[36] It also affords anyone whose rights have been adversely affected by administrative action, the right to written reasons.[37] This right has been codified in the Promotion of Administrative Justice Act.[38] It prescribes detailed provisions regarding what constitutes procedurally fair administrative action,[39] the

[28] Section 32. See generally: Davis D "Access to Information" in Cheadle et al *South African Constitutional Law* (2nd Ed) (2005) 26(1)-26(14); and Rautenbach I "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (1996) 1A78.
[29] Section 32(2).
[30] 2 of 2000.
[31] 'Public bodies' are defined as national, provincial and local government departments and other authorities undertaking public functions or exercising public power (section 1).
[32] 'Private bodies' are defined as natural or juristic persons not undertaking public functions or exercising public power (section 1).
[33] See sections 14-32 (relating to public bodies) and sections 51-61 (relating to private bodies).
[34] The grounds for refusing access to information held by public bodies and private bodies are prescribed in sections 33-46 and sections 62-70 respectively, and include: protecting the privacy of a third party; protecting commercial or confidential information; protecting the safety of individuals; protecting privileged information; and protecting information relating to defence, security and international relations.
[35] 'Administrative action' is broadly defined in the Promotion of Administrative Justice Act (2 of 2000) as '…any decision taken, or any failure to take a decision' by: (a) an organ of state exercising a power or performing a function in terms of the Constitution, a provincial constitution or any legislation; and (b) a natural or juristic person when exercising a public power or performing a public function in terms of an empowering provision – which adversely affects the rights of any person and which has a direct, external legal effect' (section 1).
[36] Section 33(1). See generally: Corder H "Administrative Justice" in Cheadle et al *South African Constitutional Law* (2nd Ed) (2005) 27(1)-27(26); and Rautenbach I "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (1996) 1A79.
[37] Section 33(2).
[38] 3 of 2000.
[39] Section 3 and section 4.

grounds for judicial review,[40] the procedures for obtaining written reasons[41] and the remedies available to courts in the event that the action is held to be unlawful, unreasonable and/or procedurally unfair.[42] Given that the establishment and management of CCAs frequently involve the exercise of administrative discretion and decision-making, the above constitutional provisions are of relevance.

Finally, section 34 affords everyone the right 'to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.[43] The practical realization of this right is reinforced through section 38 that grants a diverse array of persons standing to approach a competent court where their rights have been threatened or infringed.[44] These provisions are of relevance given the propensity for disputes to arise regarding the establishment and management of CCAs.

3. RECOGNITION OF CUSTOMARY LAW AND TRADITIONAL INSTITUTIONS

As highlighted in the preceding chapter,[45] customary law and institutions play a central role in the regulation of many CCAs, both in respect of regulating land tenure and providing for natural resource management. It is accordingly noteworthy that the Constitution expressly acknowledges 'the existence of any other rights or freedoms that are recognised or conferred by ... customary law ... to the extent that they are consistent with the Bill (of Rights)'.[46]

[40] Section 6 and section 7.
[41] Section 5.
[42] Section 8.
[43] See generally: Davis D "Access to Courts" in Cheadle et al *South African Constitutional Law* (2nd Ed) (2005) 28(1)-28(11); and Rautenbach I "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (1996) 1A80.
[44] These persons are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; and anyone acting in the public interest; and an association acting in the interests of its members. See generally: Davis D "Enforcement of Rights" in Cheadle et al *South African Constitutional Law* (2nd Ed) (2005) 32(1)-32(7); and Rautenbach I "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (1996) 1A84-1A92.
[45] See further Chapter 3 (Part 4.6).
[46] Section 39(3).

The Constitution furthermore recognises the 'institution, status and role of traditional leadership, according to customary law' and provides that these traditional authorities, which observe a system of customary law, may continue to function and apply such customary law, subject however, to the 'Constitution and any applicable legislation'.[47] With respect to these traditional authorities, the Constitution affords national and in some cases provincial government discretion to promulgate legislation providing for 'the role of traditional leadership as an institution at local level on matters affecting local communities'; and the establishment of 'houses of traditional leaders' and a 'council of traditional leaders'.[48] The status afforded to traditional authorities under the Constitution is far from clear. In the words of Marais, '(p)erhaps the most neglected contradiction in South Africa's quest for transformation is the ambiguous status and powers conferred on 'traditional' authority systems'.[49] According to other commentators, the constitutional dispensation has 'left a number of questions unanswered' and was perhaps left 'deliberately vague' owing to the new political elite's ambivalence towards the future role of traditional leaders at the time the Constitution was negotiated. [50]

In an attempt to provide some clarity, the Government has promulgated several national[51] and provincial laws[52] prescribing the powers and functions of the traditional institutions provided for in the Constitution. Notwithstanding these statutory enactments, the merits of affording statutory recognition to traditional authorities, particularly in the context of land administration remains the subject of ongoing debate. These debates

[47] Section 211.
[48] Section 212.
[49] Marais H *South African Limits to Change: The Political Economy of Transition* (2001) Zed Books London 303; and Williams M "Legislating 'Tradition' in South Africa" (2009) 35(1) *Journal of Southern African Studies* 194.
[50] Beall J & Ngonyama M *Indigenous Institutions, Traditional Leaders and Elite Coalitions for Development: The Case of Greater Durban* (2009) Working Paper No.55, Crisis States Research Centre London, 8-9. See further: Sithole P & Mbele T *Fifteen Year Review on Traditional Leadership: A Research Paper* (2008) Cato Manor: Democracy and Governance Programme, HSRC Pretoria; and Ntsebeza L "Democratic Decentralisation and Traditional Authority: Dilemmas of Land Administration in Rural South Africa" (2004) 16 (1) *European Journal of Development Research* 72.
[50] Section 40(1).
[51] These include: Traditional Leadership and Governance Framework Act (41 of 2003); and National House of Traditional Leaders Act (10 of 1997).
[52] These include: Traditional Leadership and Governance Act (Mpumalanga) (3 of 2005); Traditional Leadership and Governance Act (Eastern Cape) (4 of 2005); Traditional Leadership and Governance Act (Kwazulu-Natal) (5 of 2005); and Traditional Leadership and Institutions Act (Limpopo) (6 of 2005).

centre particularly on the extent to which it amounts to a 'retreat from democracy',[53] and a regression to the 'decentralised despotism' which characterised the role of such authorities in the administration of rural land under South Africa's pre-constitutional dispensation.[54] These laws, particularly the manner in which they purport to afford authority to traditional authorities in the context of communal land ownership, are critically considered in Chapter 6 (Part 5.3) below.

4. GOVERNANCE

The South African Government comprises of three 'distinct, interdependent and interrelated' spheres, namely national, provincial and local government.[55] The legislative and executive capacity of these three spheres, including their ability to make and administer laws of relevance to CCAs, is prescribed in the Constitution and accordingly warrants brief consideration.[56]

Consequent of their 'distinct, interdependent and interrelated' nature, the allocation of functional areas between the three spheres of government is far from simple. This is clearly epitomised in the context of CCAs where the relevant functional areas of the three spheres of government intersect one another in a rather illogical manner. Land affairs, national parks, national botanical gardens and marine resources are exclusive national competences.[57] The administration of indigenous forests, environment, cultural

[53] Ntsebeza L *Democracy Compromised: Chiefs and the Politics of Land in South Africa (2006)* HSRC Press/Brill Cape Town/Leiden 287. See further: Sithole et al *Fifteen Year Review on Traditional Leadership* (2008); Bentley K "Are Powers of Traditional Leaders in South Africa Compatible with Women's Equal Rights? Three Conceptual Arguments" (2005) 6(4) *Human Rights Review* 48-68; Cousins B & Claassens A "Communal Land Rights, Democracy and Traditional Leaders in Post-Apartheid South Africa" in Saruchera M (ed) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (2004) PLAAS Bellville 139-158; and Lungisile N *Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa: Case Studies from the Eastern Cape* (1999) PLAAS Bellville.

[54] Ntsebeza (2004) *European Journal of Development Research* 73.

[55] Section 40(1).

[56] For a full discussion of the legislative and executive competences of the three spheres of government see: Department of Provincial and Local Government *Practitioners Guide to Intergovernmental Relations in South Africa* (2007) 14-19.

[57] Section 44(1)(ii) read with Schedule 4. Schedule 4 specifically reserves competence over national parks, national botanical gardens and marine resources for national government. Land affairs and forestry are not specifically mentioned in either Schedule 4 or Schedule 5 and accordingly fall within the residual

matters, indigenous law, customary law, nature conservation, regional planning and development, soil conservation, tourism, urban and rural development, local tourism and municipal planning are concurrent national and provincial competences.[58] Provincial planning, provincial cultural matters, beaches and municipal parks are exclusive provincial competences.[59] Local government also has competence over beaches, local tourism, municipal parks and municipal planning.[60] Provision is made for: the assumption of legislative competence by any sphere of government over any matter that it 'reasonably necessary for, or incidental to, the effective' performances of the above allocated competences;[61] the assignment of allocated functions between the spheres of government;[62] and the resolution of conflicts between national, provincial and local legislation.[63]

This constitutional allocation of legislative competences has not surprisingly resulted in the land reform regime being administered by national authorities and the conservation regime by both national and provincial authorities. Whilst the overlapping constitutional mandates between the national and provincial conservation authorities held potential for conflict, this has largely been circumvented by initially the assignment of many of the powers under the old conservation regime to the provincial authorities,[64] and more recently, the express allocation of significant authority within contemporary national conservation legislation to provincial environmental Ministers.[65]

Notwithstanding the dictates of cooperative governance enshrined in Chapter 3 of the Constitution,[66] the country's national conservation and land reform authorities have in

competence of national government.
[58] Section 44(1)(ii) read together with section 104(1)(b)(i) and Schedule 4.
[59] Section 104(1)(b)(ii) read together with Schedule 5.
[60] Section 156 (1) read together with Schedule 4 (Part B) and Schedule 5 (Part B).
[61] See section 44(3), section 104(4) and section 156(5).
[62] Section 44(1)(3) and section 104(1(c).
[63] See section 146 (conflicts between national and provincial legislation) and section 156(3) (conflicts between national/provincial legislation and municipal legislation).
[64] For example, the now-repealed section 18 which provided for the declaration of special nature reserves under the Environment Conservation Act (73 of 1989), was assigned to the provinces.
[65] Extensive powers have, for example, been allocated to the provincial environmental Ministers under the Biodiversity Act and the Protected Areas Act.
[66] Chapter 3 of the Constitution prescribes a comprehensive set of principles of co-operative governance

contrast been operating in dysfunctional isolation from one another for the bulk of the past fifteen years. Various recent initiatives specifically seek to bridge the divide between these two administrations. These initiatives are: the conclusion of a *Memorandum of Agreement*[67] between the erstwhile Minister of Agriculture and Land Affairs and the Minister of Environmental Affairs and Tourism to expedite the resolution of land claims within protected areas; and the development of a *National Co-Management Framework*[68] to guide the resolution of such claims. The concerns relating to cooperative governance and the above recent efforts to resolve the dysfunctional relationship between the country's conservation and land reform authorities are discussed more fully in Chapter 7 below.

5. CONCLUSION

Within this chapter I have briefly discussed the broad constitutional framework of potential relevance to the domestic regulation of CCAs. Three broad areas have been canvassed. The first is the array of relevant rights enshrined in the Constitution, most notably the environmental right and the property clause. The former has raised the profile of environmental issues, provided the impetus for the revision of South Africa's environmental regime (including its protected areas regime) and afforded express recognition to the mutual and respective merits of the conservation and sustainable use paradigms. The latter has provided the framework for South Africa's comprehensive land reform programme. Whilst providing the constitutional foundation for biodiversity

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and inter-governmental relations. Section 41(1) provides in this regard that: 'All spheres of government and all organs of state within each sphere must - (i) provide effective, transparent, accountable and coherent government for the Republic as a whole; (ii) respect the constitutional status, institutions, powers and functions of government in the other spheres; (iii) not assume any power or function except those conferred on them in terms of the Constitution; (iv) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (v) co-operate with one another in mutual trust and good faith by - (vi) fostering friendly relations; (vii) assisting and supporting one another; (viii) informing one another of, and consulting one another on, matters of common interest; (ix) co-ordinating their actions and legislation with one another; (x) adhering to agreed procedures; and (xi) avoiding legal proceedings against one another.' Section 40(2) further provides that all spheres of government are required to 'observe and adhere to the principles in this Chapter and must conduct their activities' accordingly (section 40(2)).

[67] Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* dated 2 May 2007.

[68] Department of Environmental Affairs *National Co-Management Framework* (2010).

conservation and land reform in South Africa, very little clarity is unfortunately provided as to the intersection of these realms and which should triumph over the other where conflicts arise. According to Kepe, this 'apparent disjuncture' in the Constitution has similarly permeated the domestic legal framework governing conservation and land reform.[69]

The second is the recognition afforded to customary laws and institutions of traditional authority. What is noteworthy in this regard is that while customary law and traditional authorities play a significant role in the context of land administration, their role in the context of conservation is yet to be fully realised.

The final area discussed in this chapter is that of governance. I highlighted the legislative and executive competences afforded to the three spheres of government to make and administer laws of relevance to CCAs. I argued that the overlapping and fragmented nature of these competences is partly to blame for the dysfunctional divide that has characterised the relationship between the conservation and land reform regimes for the bulk of the past two decades.

Prolific legislative activity has permeated all three of the above areas during the course of the past two decades. Through this legislative reform, the three spheres of Government have sought to give effect to the rights enshrined in the Constitution; provide for the recognition of customary laws and institutions; and simultaneously adhere to the bounds of their constitutional competence and the dictates of cooperative governance. It is to a detailed analysis of this comprehensive legal framework, the policies that inform it and the institutions that administer it, that the enquiry now turns.

[69] Kepe T "Land Claims and Comanagement of Protected Areas: Exploring the Challenges" (2008) 41 *Environmental Management* 319. This 'apparent disjuncture' and the steps that have been taken to reconcile it are fully considered in Chapter 7.

CHAPTER 5

SOUTH AFRICA'S CONSERVATION REGIME OF RELEVANCE TO COMMUNALLY-CONSERVED AREAS

1. INTRODUCTION

Over the past two centuries, South Africa has developed a comprehensive legal framework aimed at conserving the country's natural resources. Until as recently as five years ago, this legal framework was largely founded on the traditional exclusionary and state-centred approach to conservation. It is accordingly not surprising that during this legislative era, South Africa's conservation regime made little provision for the domestic implementation of communally-conserved areas (CCAs). However, the commencement of the National Environmental Management: Protected Areas Act[1] (Protected Areas Act) and the National Environmental Management: Biodiversity Act[2] (Biodiversity Act) in late 2004, have cumulatively precipitated a shift towards a more inclusive, participatory and human-centred approach to conservation. These two laws contain an array of legal mechanisms that can be used to implement CCAs. For the purpose of analysis, a distinction is accordingly drawn between these two regulatory eras: the pre-2005 conservation regime, and the post-2005 conservation regime. The bulk of attention will logically be placed on the latter era.

[1] Act 57 of 2003. The bulk of the Act commenced on 1 November 2004 (GN 52 *GG* No. 26960 dated 2 November 2004).
[2] Act 10 of 2004. The bulk of the Act commenced on 1 September 2004 (GN 47 *GG* No. 26887 dated 8 October 2004).

2. THE PRE-2005 REGIME

Although the origins of South Africa's conservation regime can be found in colonial forestry reserve laws dating back to 1888,[3] the forging of a comprehensive national and provincial conservation regime really arose in the 1970s with the promulgation of the National Parks Act[4] and a series of provincial Nature Conservation Ordinances.[5] This legislative base has, during the course of the past twenty years, been supplemented by a vast array of national and provincial laws of relevance to conservation.[6] Inherent in this regime are traditional legal approaches to conserving and managing natural resources, namely area regimes and species regimes.

During this era, twenty laws provided for the designation of over twenty-five different types of protected areas,[7] resulting is approximately 6.5 % of South Africa's terrestrial

[3] See: Child B "The Emergence of Parks and Conservation Narratives in Southern Africa" in Suich H, Child B & Spenceley A (eds) *Evolution and Innovation in Wildlife Conservation* (2009) Earthscan London 21-23; Department of Environmental Affairs and Tourism *White Paper on the Conservation and Use of South Africa's Biodiversity* (1997) (published in GN 1095 *GG* No.18163 dated 28 July 1997) Ch 1 (para. 1.3) and Grove R "Early Themes in African Conservation: The Cape in the Nineteenth Century' in Anderson D & Grove R *Conservation in Africa: People, Policies and Practice* (1987) Cambridge University Press, Newcastle Upon Tyne 21-39.

[4] Act 57 of 1976.

[5] These are: Nature Conservation Ordinance (Transvaal) (12 of 1983); Nature Conservation Ordinance (Cape) (19 of 1974); Nature Conservation Ordinance (Natal) (15 of 1974); and Nature Conservation Ordinance (OFS) (8 of 1969). Various conservation Acts and Decrees were also promulgated in respect of the homelands declared under the apartheid regime and those still in operation today include: Transkei Environmental Conservation Decree (9 of 1992); Nature Conservation Act (Ciskei) (10 of 1987); Protected Areas Act (Bophuthatswana) (24 of 1987); and the Bophuthatswana Nature Conservation Act (3 of 1973).

[6] National laws of relevance to conservation include: World Heritage Convention Act (49 of 1999); National Heritage Resources Act (25 of 1999); National Environmental Management Act (107 of 1998); National Forests Act (84 of 1998); Animal Improvement Act (62 of 1998); National Water Act (36 of 1998); Marine Living Resources Act (18 of 1998); Genetically Modified Organisms Act (15 of 1997); Environment Conservation Act (73 of 1989); Forest Act (122 of 1984); Conservation of Agricultural Resources Act (43 of 1983); Mountain Catchment Areas Act (63 of 1970); Plant Improvement Act (53 of 1976); Sea Birds and Seals Protection Act (46 of 1973); Lake Areas Development Act (39 of 1975); and Plant Breeders' Rights Act (15 of 1976). Provincial laws of relevance include: Eastern Cape Parks and Tourism Act (2 of 2010); Northern Cape Nature Conservation Act (9 of 2009); Mpumalanga Tourism and Parks Agency Act (5 of 2005); Provincial Parks Board Act (Eastern Cape) (12 of 2003); Limpopo Environmental Management Act (7 of 2003); Limpopo Tourism and Parks Board Act (8 of 2001); Mpumalanga Nature Conservation Act (10 of 1998); Kwazulu-Natal Nature Conservation Management Act (9 of 1997); and Kwazulu-Natal Nature Conservation Act (29 of 1992).

[7] National laws providing for protected areas include: National Parks Act; Environment Conservation Act; Forests Act; National Forests Act; Marine Living Resources Act; Mountain Catchment Areas Act; World Heritage Convention Act; National Heritage Resources Act; Lake Areas Development Act; and Sea Birds

environment and 21.5 % of its coastal environment being accorded formal protected areas status.[8] An array of national[9] and provincial[10] planning laws, principally through the application of municipal zoning schemes, secured additional land for conservation.[11] Species regimes, in terms of which various species of fauna or flora are listed and activities strictly regulated, were also prevalent.[12] A licence was generally required prior to undertaking any activity that impacted on a listed species. Finally, various laws identified activities generally, or in respect of certain specific areas, with potential to negatively impact on South Africa's natural resources.[13] Any person wishing to undertake such an activity was generally required to obtain prior formal authorisation, frequently preceded by some form of environmental impact assessment.

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and Seals Protection Act. Provincial laws providing for protected areas include: Mpumalanga Nature Conservation Act; Limpopo Environmental Management Act; Kwazulu-Natal Nature Conservation Management Act; Provincial Parks Board Act (Eastern Cape); Nature Conservation Ordinance (Cape); Nature Conservation Ordinance (Transvaal); Nature Conservation Ordinance (OFS); Transkei Environmental Conservation Decree; Nature Conservation Act (Ciskei); Protected Areas Act (Bophuthatswana); and the Bophuthatswana Nature Conservation Act.

[8] *National Biodiversity Framework* (GN 813 *GG* No. 32474 dated 3 August 2009) 78.

[9] National planning laws include: Development Facilitation Act (67 of 1995); Local Government Transition Act (209 of 1993); Physical Planning Act (125 of 1991); Black Communities Development Act (4 of 1984); and Less Formal Townships Establishment Act (113 of 1991).

[10] Each province in South Africa promulgated its own Planning Ordinance or Act to regulate planning at provincial level. These include: Land-Use Planning Ordinance (15 of 1985) (applicable in the Western Cape, Northern Cape and Eastern Cape); Townships Ordinance (9 of 1969) (applicable in the Free State); Town Planning and Township Ordinance (19 of 1986) (applicable in Gauteng, Mpumalanga, Limpopo, North West Province); and the KwaZulu-Natal Planning and Development Act (5 of 1998).

[11] Zoning schemes, developed and implemented by local government, currently provide for a range of land-use categories including open space. Land zoned as 'open space' is typically reserved for nature reserves and conservation use. Development is subject to strict control and generally requires the prior approval of an environmental management plan.

[12] The lists of species and permitting arrangements are generally found in provincial legislation such as: Mpumalanga Nature Conservation Act; Limpopo Environmental Management Act; Kwazulu-Natal Nature Conservation Management Act; Nature Conservation Ordinance (Cape); Nature Conservation Ordinance (Transvaal); and Nature Conservation Ordinance (OFS).

[13] The lists of activities and permitting arrangements can be found in many laws most notably: *Environmental Impact Assessment Regulations* (GNR 543-546 *GG* No. 33306 dated 18 June 2010) promulgated under the National Environmental Management Act, which regulate activities with the potential to detrimentally impact on the environment; the *Outeniqua Sensitive Coastal Area Regulations* (GNR 879-881 *GG* No. 17213 dated 31 May 1996) and *Pennington and Umtamvuna Sensitive Coastal Area Regulations* (GNR 1529-1531 *GG* No. 19493 date 27 November 1998) promulgated under the Environment Conservation Act, which regulate activities which may detrimentally impact on these sensitive coastal areas; Genetically Modified Organisms Act which regulates genetically modified organism; National Forests Act, which regulates forest resources; National Water Act, which regulates water resources; Minerals and Petroleum Resources Development Act (28 of 2002), which regulates prospecting and mining activities; and the Conservation of Agricultural Resources Act, which regulates agricultural activities.

However, notwithstanding the existence of this extensive network of laws, the demise of the country's natural resources continued at an alarming rate. Commentators argued that this was partly due to South Africa's ineffective and outdated regulatory framework.[14] Many issues appear to have contributed to its failure, namely: lack of political will; the absence of an adequate planning framework; legislative and institutional fragmentation; capacity and resource constraints; reliance on command-and-control strategies; and the adoption of an exclusionary approach to conservation.[15] The latter three, discussed in detail below, are of key relevance to the current enquiry.

Conservation is an expensive exercise.[16] Raising sufficient funds to support conservation is a significant challenge especially where competing socio-economic imperatives such as health care, housing, education, welfare, security, economic growth and job creation are generally prioritised over conservation.[17] This is very evident if one considers that South Africa's national budgetary allocation to biodiversity conservation has decreased from 0.28 % of the national budget in 1996[18] to 0.048 % in 2010.[19]

These meagre Government allocations have significantly undermined the ability of key national and provincial institutions to implement and enforce conservation legislation.[20]

[14] In his regard see: Kumleben M, Sangweni S & Ledger J *Board of Investigation into the Institutional Arrangements for Nature Conservation in South Africa: Report* (1998) 9-10; Hanks J & Glavovic B "Protected Areas" in Fuggle R & Rabie A (eds) *Environmental Management in South Africa* (1992) Juta & Co Ltd Cape Town 712-714; and *White Paper on the Biodiversity* (1997) 30.

[15] These problems were identified in the *White Paper on Biodiversity (1997)* Ch 1 (para. 1.5). For a full discussion of these problems, see: Paterson A "Wandering About South Africa's New Protected Areas Regime' (2007) (1) *SA Public Law* 2-10.

[16] Expenses associated with biodiversity regulation include: developing strategic planning frameworks; identifying and monitoring the status of vital biological resources; formulating policy and legislation to manage these resources; funding administration, compliance and enforcement; securing land for inclusion within protected areas; managing the biological resources situated both within and outside these areas; and increasing public awareness.

[17] Schmidtz D & Willott E "2003 Symposium: Environmental Ethics and Policy: Bringing Philosophy Down to Earth: Reinventing the Commons: An African Case Study" (2003) 37 *U.C. Davis Law Review* 224. See further Turpie J & Siegfried W "The Conservation-Economic Imperative: Securing the Future of Protected Areas in South Africa" (1996) 4 *Africa Environment & Wildlife* 36.

[18] Kumleben *Board of Investigation Report* (1998) 32-34.

[19] Accordingly to National Treasury *Estimates of National Expenditure 2010* (2010) only R399.3 million of the total expenditure of R818.1 billion (constituting 0.048 % of the annual budget) was directly allocated to biodiversity conservation.

[20] Take, for example, the obligations imposed on landowners to clear alien invasive vegetation in South Africa under the Conservation of Agricultural Resources Act (GN R1048 *GG* No. 9238 dated 25 May

They have also impacted on the Government's ability to administer South Africa's protected areas properly. Management responsibilities have been neglected in certain circumstances and the continued viability of several protected areas has been placed in jeopardy.[21] Given that national conservation budgets are unlikely to be increased in the near future and the fallacy of protected areas becoming economically self-sufficient, the Government recognised the need to identify alternative sources of funding to manage protected areas and create opportunities to share the management of these areas with the public, including local communities.[22] The pre-2005 conservation regime did not, however, contain adequate legal mechanisms to enable them to co-opt such support.

Raising resources to manage the existing protected areas network was but one financial concern. In compliance with its international obligations, the Government originally committed to increasing the proportion of South Africa's terrestrial territory situated within protected areas from 6.5 % to 10 %.[23] It has however recently increased its commitment to having 12 % of all terrestrial ecosystems included in protected areas in the next 20 years.[24] This is estimated to amount to an additional 8.8 % of the country's territory given the fact that certain key eco-systems are currently under represented in the protected areas network.[25] The decreasing availability of suitable state land compelled the Government to focus its attention on private land, and more recently communal land, which jointly constitute approximately 84 % of the country's territory.

1984). Although having been on the statute books for over twenty years and alien invasive vegetation posing one of the greatest threats to the nation's biodiversity, not one conviction has been successfully prosecuted under the Act. See further Preston G & Siegfried W "The Protection of Biological Diversity in South Africa: Profiles and Perceptions of Professional Practitioners in Nature Conservation Agencies and Natural History Museums" (1995) 25 (2) *South African Journal of Wildlife Research* 49-56.

[21] Geach B & Peart R "Land, Resource Use, Biodiversity and Desertification in South Africa: An Overview and Analysis of Post-1994 Policies, Programmes, Institutions and Financial Mechanisms" Unpublished paper presented at Workshop on Financial Innovations to Combat Desertification, 12th Global Biodiversity Forum, Dakar, December 1998, 24. See further: Kumleben *Board of Investigation Report* (1998) 37.

[22] Kumleben *Board of Investigation Report* (1998) 30,31 & 37-39.

[23] Department of Environmental Affairs and Tourism *10 Year Review (1994-2004)* (2005) 44. These targets have recently been restated in Government of South Africa *National Protected Areas Expansion Strategy for South Africa 2008* (2009) 1. These percentages accord with those recommended by the IUCN and agreed to by parties attending the World Parks Congress (2003). In this regard, see the *Durban Accord*, the *Durban Action Plan* and *World Park Congress Recommendations* (all of which are available at www.iucn.org/themes/wcpa/wpc2003/). These documents reflect the outcomes and plan of action following the World Parks Congress.

[24] *National Protected Areas Expansion Strategy* (2009) 13-20.

[25] Ibid.

The Government did not, however, have the resources to purchase this land, and it therefore acknowledged the need for alternative mechanisms to enable, and incentives to encourage, the incorporation of private and communal land within protected areas.[26] Its problems were further compounded by the impact of South Africa's land reform process under which ownership of large tracts of state land situated within existing protected areas were restored to local communities. The pre-2005 conservation regime did not provide appropriate legal mechanisms to facilitate the voluntary incorporation of non-state land with protected areas, or to deal with those situations where communal land rights were granted over land situated within existing protected areas through the land reform process.

A further problem characterising the pre-2005 era, was the Government's reliance on the command-and-control approach to regulation. The laws promulgated during this era generally prescribed a range of legislative standards, prohibitions and restrictions. Non-compliance with these was subject to potential prosecution and sanction. However, as has been identified both internationally[27] and domestically,[28] wholesale reliance on this command-and-control approach in any regulatory context is problematic. High costs associated with the administration, compliance and enforcement of direct regulation often plagues effective implementation. Prescribed standards, prohibitions and restrictions are frequently inflexible and unable to cater for geographical, sectoral or individual specificities. In addition, the command-and-control approach does not generally facilitate and encourage voluntary action.

[26] Crowe T "Developing a National Strategy for the Protection and Sustainable Use of South Africa's Biodiversity" (1996) 92 *South African Journal of Science* 219.

[27] See generally: Wilke K *What Is In It For Me: Exploring Natural Capital Incentives* (2005) Canada West Foundation Calgary 2-4; Milne J, Deketelaere K, Kreiser L & Ashiabor H *Critical Issues in Environmental Taxation* (2003) 27-51; James D *Environmental Incentives: Australian Experience with Economic Instruments for Environmental Management* (1997) *Environmental Economics Research Paper* No.5, Environment Australia Canberra 13; Bruce N & Ellis G *Environmental Taxes and Policies for Developing Countries* (1993) *World Bank Policy Research Working Paper* No.WPS1177, World Bank Washington DC; Westin R "Understanding Environmental Taxes" (1992) 46 (2) *Tax Lawyer* 327-330; and Pearce D, Markandya A & Barbier E *Blueprint for a Green Economy* (1989) Earthscan London 153-172.

[28] See generally: Paterson A "Property Tax a Friend or Foe for Landscape Protection in South Africa" (2005) 12 *South African Journal of Environmental Law & Policy* 97; Paterson A "Tax Incentives - Valuable Tools for Biodiversity Conservation in South Africa" (2005) 122 *South African Law Journal* 182; Henderson P "Fiscal Incentives for Environmental Protection - Introduction" (1994) 1 *South African Journal of Environmental Law & Policy* 50-52; and Stauth R & Baskind P "Resource Economics" in Fuggle et al *Environmental Concerns in South Africa* (1983) 39-40.

These problems played out very vividly in the context of domestic conservation efforts.[29] Given the Government's resource constraints, it was unable to effectively fund the high costs associated with direct regulation. Given the diversity of species, ecosystems, threats and stakeholders, inflexible regulation proved unworkable. Given the situation of the majority of biological resources on private land, the failure to facilitate and encourage extensive voluntary public action proved to be unviable. While the pre-2005 conservation legislation contained a few mechanisms for co-opting public support for various forms of protected areas,[30] these largely fell into disuse owing to the absence of associated incentives to encourage and reward such support.[31] The Government accordingly recognised the need to reassess its regulatory approach and consider a more cooperative and incentive-based approach aimed at enabling and encouraging the public, including local communities, to become active participants in conservation.[32]

Finally, the majority of pre-2005 conservation legislation was based on the premise that effective conservation required the exclusion of the public.[33] Express provision for public

[29] See generally: Paterson (2007) *SA Public Law* 1-33; Paterson (2005) *South African Law Journal* 182-216; and Paterson (2005) *South African Journal of Environmental Law and Policy* 97-121.

[30] Express provision was made for the voluntary incorporation of private land (generally by way of written agreement between the landowner and the conservation authorities) within an array of laws including: national parks (section 2(B(1)(b) of the National Parks Act - now repealed); special nature reserves (section 18(2)(bA) of the Environment Conservation Act - now repealed); forest nature reserves and wilderness areas (section 8(1)(c) of the National Forests Act); private nature reserves (section 12(1) of the Nature Conservation Ordinance (Cape); section 59-66 of the Nature Conservation Ordinance (Natal); and section 21 read with section 26 of the Limpopo Environmental Management Act); sites of ecological importance and protected environments (section 18 and section 21 read with section 26 of the Limpopo Environmental Management Act); and nature reserves and conservancies (section 85 of the Mpumalanga Nature Conservation Act).

[31] Under the now largely repealed National Parks Act, no property tax could be levied on land, including private land, situated within a national park (section 18). This incentive was, however, largely insignificant as the majority of land suitable for incorporation within national parks was not invariably subject to property tax. A similar exemption still applies to private land situated within mountain catchment areas, declared in terms of the Mountain Catchment Areas Act, and in respect of which a directive has been issued to cease farming operations (section 5). This Act does not, however, make provision for individuals or communities to voluntarily contract their land into these mountain catchment areas and therefore this benefit does not act as an incentive, but rather as a form of compensation for having had one's land-use rights curtailed.

[32] *White Paper Biodiversity* (1997) Chap 3(D).

[33] Kepe T, Wynberg R & Ellis W "Land Reform and Biodiversity Conservation in South Africa: Complementary or in Conflict" (2005) 1 *International Journal of Biodiversity Science and Management* 7.

participation in the formation and management of protected areas was largely absent.[34] So too was recognition of the need to ensure equitable access, use and benefit-sharing by local communities living within and adjacent to protected areas.[35] Protected areas were often established on land formerly owned or occupied by local communities who were frequently displaced and denied access and use rights.[36] This problem was not confined, however, to within the borders of protected areas. With the majority of South Africa's territory being privately-owned by the minority white population, the result of apartheid land policies, the bulk of the population had no opportunity to access and use the nation's biological resources. Conservation therefore became regarded as an elitist concern, the 'preserve of the privileged members of society',[37] and protected areas, the 'playgrounds for the privileged elite'.[38]

This exclusionary approach was, however, subject to extensive domestic criticism. Commentators argued that it was unsustainable especially in a developing economy such as South Africa where broad sectors of society were dependant on accessing biological resources to sustain their livelihoods.[39] Calls were made for the introduction of a more human-centred approach to biodiversity regulation with a focus on community-based natural resource management.[40] It was argued that in order for such an approach to be successfully implemented in South Africa, both within and outside of protected areas, genuine proprietorship, in other words, the right to use resources and determine the mode of usage, distribution of such benefits and rules of access had to be granted

[34] Paterson (2007) *SA Public Law* 9-11.
[35] Paterson (2007) *SA Public Law* 5-6.
[36] Kumleben *Board of Investigation Report* (1998) 42. See further: Summers R "Legal and Institutional Aspects of Community-Based Wildlife Conservation in South Africa, Zimbabwe and Namibia' (1999) *Acta Juridica* 188; and Magome H "Land Use Conflicts and Wildlife Management in Southern Africa" in Hirschoff P, Metcalfe S & Rihoy L (eds) *Rural Development and Conservation in Africa: Studies in Community Resource Management* (1996) Africa Resources Trust Zimbabwe 10-14.
[37] Kumleben *Board of Investigation Report* (1998) 42.
[38] *White Paper on Biodiversity* (1997) 33; and De Villiers B *People and Parks - Sharing the Benefits* (2008) KAS Johannesburg 4.
[39] Summers (1999) *Acta Juridica* 189. See further Bothma J & Glavovic B "Wild Animals" in Fuggle et al *Environmental Management in South Africa* (1992) 251 & 258.
[40] Mandondo A *Dialogue of Theory and Empirical Evidence: A Weighted Decision and Tenurial Niche Approach to Reviewing the Operation of Natural Resource Policy in Rural Southern Africa'* (2005) *Commons Southern Africa*: Occasional Paper Series No.10, CASS/PLAAS Harare/Bellville 11; and Summers (1999) *Acta Juridica* 191.

to local communities.[41] In the context of protected areas, critics argued that public participation needed to extend to determining reserve boundaries, preparing management plans and sharing in the economic benefits derived from their establishment.[42] Although various initiatives were undertaken in the pre-2005 era to facilitate local community access to natural resources situated within various protected areas, these were few and far between.[43] Accordingly, there were calls for local community participation to be prescribed as a matter of law, rather than retained as a discretionary administrative policy.[44] Taking heed of this domestic concern and the shift in the international conservation discourse towards a more inclusive, participatory and human-centred approach, the Government acknowledged the need to divert from its wholesale reliance on the outdated state-centred exclusionary approach.[45]

3. THE POST-2005 REGIME

Precipitated by its ratification of the *Convention on Biological Diversity* in 1995,[46] the Government initiated a comprehensive reform process to bring its domestic conservation regime in line with its international obligations. Informing this process were various policy papers and reports published in the late 1990's, the most notable of which were the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity*[47] and the *Report of the Board of Investigation into the Institutional Arrangements for Nature Conservation in South Africa*.[48] These documents reflected many of the criticisms of the pre-2005 regime discussed above, and advocated a

[41] Murphree M *Communities as Resource Management Institutions* (1992) Gatekeeper Series No.36, IIED London 11.
[42] Bothma et al "Wild Animals" in Fuggle et al *Environmental Management in South Africa* (1992) 258.
[43] See generally the examples cited in: Kumleben *Board of Investigation Report* (1998) 44-47; and Department of Environmental Affairs and Tourism *People, Parks and Transformation in South Africa: A Century of Conservation, A Decade of Democracy* (2003) 48-52.
[44] Bothma et al "Wild Animals" in Fuggle et al *Environmental Management in South Africa* (1992) 258.
[45] *National Biodiversity Strategy and Action Plan* (2005) 62-67; and Kumleben *Board of Investigation Report* (1998) 66.
[46] South Africa ratified the *Convention on Biological Diversity* on 2 November 1995.
[47] *White Paper on Biodiversity* (1997).
[48] The Kumleben *Board of Investigation Report* (1998) was commissioned by the Minister of Environmental Affairs and Tourism to investigate and make recommendations on certain practical aspects relating to South Africa's protected areas regime such as: institutional arrangements; classification of protected areas; declaration and management regimes; financing protected areas; and increasing local community involvement.

fundamental shift in approach to conservation regulation from '… preservation to conservation and sustainable use; from exclusivity to participation and sharing; … from fences and fines to incentives and individual responsibility'.[49]

Drawing on the goals and objectives set out in these documents, the Government grappled for a further seven years to design its contemporary conservation regime. This process culminated in the promulgation of the Biodiversity Act, which regulates a broad range of issues such as biodiversity planning, threatened and protected ecosystems and species, alien invasive species, bio-prospecting, access and benefit-sharing; and the Protected Areas Act, which prescribes the country's contemporary protected areas regime.

3.1 THE LAWS

Inherent in this post-2005 conservation regime, and in line with the general objectives of the *Convention on Biological Diversity*,[50] is a clear acknowledgement by the Government that it cannot alone halt the rapid demise of the nation's biodiversity. People are recognised as indispensable allies in this process. So too is the need to move away from the traditional state-centred exclusionary approach towards an inclusive, participatory and human-centred approach which recognises that one cannot divorce people from conservation and protection from sustainable use. Both the Biodiversity Act and the Protected Areas Act contain an array of novel statutory mechanisms for implementing this approach, several of which provide opportunities for affording domestic recognition to CCAs.

[49] *10 Year Review* (2005) 44.
[50] The three main objectives of the *Convention on Biological Diversity* are: to conserve biological diversity; provide for the sustainable use of its components; and ensure the fair and equitable sharing of the benefits derived from such use (Article 1).

3.1.1 *National Environmental Management: Biodiversity Act*

The Biodiversity Act is *the* Government's first attempt to regulate the nation's biological resources in a holistic manner. The Government is appointed as the trustee of South Africa's biological diversity.[51] Central to the Act's implementation is a three-tier planning framework to manage biodiversity, an element that was amiss under previous conservation legislation.[52]

Against this planning framework, the Biodiversity Act regulates a broad range of issues relevant to biodiversity conservation. First, it provides for the declaration of threatened and protected ecosystems and species.[53] Once so declared, activities that may threaten or impact on these ecosystems or species are restricted in various ways.[54] Secondly, it regulates species and organisms posing potential threats to biodiversity such as alien species,[55] invasive species[56] and genetically modified organisms.[57] The Act lists a range of restricted activities[58] relating to these species that cannot be undertaken without permission and imposes a broad duty of care on persons who are so permitted.[59] Thirdly, it seeks to regulate the vexed issues of bio-prospecting,[60] access

[51] Section 3.
[52] Chapter 3. This planning framework, discussed in detail hereunder, consists of a national biodiversity framework, bioregional plans and biodiversity management plans.
[53] Chapter 4. These provisions are complemented by the *Threatened or Protected Species Regulations* (GNR 151-152 *GG* No. 29657 dated 23 February 2007) which came into force on 1 July 2007. They will be further complemented by the *Convention on International Trade in Endangered Species of Wild Fauna and Flora Regulations* (GNR 173 *GG* No. 33002 dated 5 March 2010). The latter Regulations are yet to commence.
[54] Persons seeking to undertake listed activities impacting on a threatened ecosystem are required to undertake an EIA (section 53); while those seeking to undertake restricted activities impacting on a threatened or protected species require a permit to do so (section 57). Provision is also made for regulating the trade in these threatened and protected species (sections 59-62).
[55] 'Alien species' are defined as '…(a) a species that is not an indigenous species; or (b) an indigenous species translocated…to a place outside its natural distribution range in nature, but not an indigenous species which has extended its natural distribution range by means of migration or dispersal without human intervention' (section 1).
[56] 'Invasive species' are defined as '…those whose establishment and spread outside of its natural distribution range - (a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and (b) may result in economic or environmental harm or harm to human health' (section 1).
[57] Chapter 5. These provisions will be complemented by the *Draft Alien and Invasive Species Regulations* (GNR 347-350 *GG* No. 32090 dated 3 April 2009) when they are finalised.
[58] These include activities such as importing, growing, transporting and selling alien species.
[59] See section 65-69 (alien species) and sections 70-77 (invasive species) regarding the full range of

and benefit-sharing.[61] This is principally achieved through permitting schemes,[62] which must be preceded by benefit-sharing agreements[63] or material transfer agreements;[64] and the establishment of a Bio-prospecting Trust Fund to hold and distribute all money generated from such agreements.[65] Finally, the Biodiversity Act provides for the establishment and functions of the South African National Biodiversity Institute that assists the Government in biodiversity conservation.[66]

In acknowledging the failings of the previous regime, the Biodiversity Act provides two key opportunities for local communities to become active participants in its implementation. The first relates to the implementation of the Act's biodiversity planning framework; and the second, bio-prospecting. It is the former that warrants further attention in that it provides a viable platform for implementing CCAs.

As alluded to above, one of the most significant improvements introduced by the Biodiversity Act is the prescription of a three-tier domestic biodiversity planning framework at national, regional and local level. First, the Minister of Environmental Affairs and Tourism is required to prescribe a *National Biodiversity Framework*.[67] This *National Biodiversity Framework*, complemented by a *National Spatial Biodiversity*

available control measures.

[60] Bio-prospecting is defined, in relation to indigenous biological resources, as 'any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation, and includes - (a) the systematic search, collection or gathering of such resources or making extractions from such resources for purposes of such research, development or application; (b) the utilization for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities; or (c) research on, or the application, development or modification of, any traditional uses, for commercial or industrial exploitation' (section 1).

[61] Chapter 6. These provisions are complemented by the *Regulations on Bio-Prospecting, Access and Benefit-Sharing* (GNR 138 *GG* No. 30739 dated 8 February 2009). These Regulations came into force on 1 April 2008.

[62] Section 81.

[63] Section 83. The purpose of these agreements is to regulate the sharing of benefits derived from the biospropecting.

[64] Section 84. The purpose of these agreements is to regulate the transfer of any indigenous biological resources for bio-prospecting purposes.

[65] Section 85.

[66] Chapter 2.

[67] Section 38. The purpose of this national framework is to: provide an integrated, co-ordinated and uniform approach to biodiversity management by all spheres of government, communities, the private sector and the public; identify priority areas for conservation and the establishment of protected areas; and reflect regional co-operation on issues concerning biodiversity management in Southern Africa (section 39).

Assessment[68] and *National Biodiversity Strategy and Action Plan,*[69] has recently been published.[70] Secondly, the Minister or relevant member of the provincial Executive Council (MEC)[71] may determine certain geographical regions as bioregions and publish bioregional plans for the management of the biodiversity in the region.[72] No such plans have been formally declared to date.

Although the above provide a vital planning context and contain references to the role of local communities in conserving South Africa's natural resources,[73] it is the third tier of the planning framework, namely biodiversity management plans, which hold real potential for implementing CCAs. Any person, organisation or organ of state wishing to contribute to biodiversity management may submit to the Minister, for her approval, a biodiversity management plan for an ecosystem,[74] indigenous species[75] or migratory species[76] in need of protection. The biodiversity management plan must be aimed at ensuring the long-term survival in nature of the species or ecosystem to which the plan relates and must be consistent with the *National Biodiversity Framework* and any

[68] Driver A, Maze K, Rouget M, Lombard A, Nel J, Turpie J, Cowling R, Desmet P, Goodman P, Harris L, Jonas Z, Reyers B, Sink K & Strauss T *National Spatial Biodiversity Assessment 2004: Priorities for Biodiversity Conservation in South Africa* (2005) *Strelitzia* 17, South African National Biodiversity Institute Pretoria. The *National Spatial Biodiversity Assessment*, commissioned by the erstwhile Department of Environmental Affairs and Tourism, contains an assessment of South Africa's biodiversity, socio-economic and political context and provides an overview of key issues, constraints and opportunities identified in this assessment.

[69] Department of Environmental Affairs and Tourism *South Africa's National Biodiversity Strategy and Action Plan* (2005). The *National Biodiversity Strategy and Action Plan* was commissioned by the erstwhile Department of Environmental Affairs and Tourism. It aims to establish a framework and plan of action for the conservation and sustainable use of South Africa's biodiversity and the equitable sharing of benefits derived from this use.

[70] GN 813 *GG* No. 32474 dated 3 August 2009.

[71] The Member of the Executive Council (MEC) of a province who is responsible for the conservation of biodiversity.

[72] Bioregions and associated bioregional plans can be declared if a region contains whole or several nested ecosystems and is characterised by its landforms, vegetation cover, human culture and history (section 40(1)). Bioregional plans must contain measures for the effective management of biodiversity within a given region, provide for monitoring of the plan and be consistent with the national biodiversity framework (section 41). *Guidelines Regarding the Determination of Bioregions and the Preparation of and Publication of Bioregional Plans* have been published (in GN 291 *GG* No. 32006 dated 16 March 2009).

[73] *National Biodiversity Framework* (GN 813 *GG* No. 32474 dated 3 August 2009) 30, 60, 79 & 87; and *National Biodiversity Strategy and Action Plan* (2005) 10, 18, 27, 29, 57, 62-63, 69, 71 & 73.

[74] These ecosystems may be those formally listed in terms of section 52 of the Act or which are not listed but which do warrant special conservation attention (section 43(1)(a)).

[75] These species may be those formally listed in terms of section 56 of the Act or which are not listed but which do warrant special conservation attention (section 43(1)(b)).

[76] Section 43(1)(c).

applicable bioregional plan.[77] *Norms and Standards for Biodiversity Management Plans for Species*[78] have been prescribed to inform the content of these plans and the procedures for their adoption. The Minister must identify a suitable person, organisation or organ of state that will be responsible for implementing the plan,[79] must assign responsibility to it for doing so,[80] and may enter into a biodiversity management agreement with it to regulate its practical implementation.[81]

It is these biodiversity management agreements that provide a potentially valuable tool for implementing CCAs. The scope of these agreements is currently vaguely prescribed and accordingly potentially vast with regard to: the nature and number of the contracting parties;[82] their geographical ambit;[83] the objectives sought to be achieved;[84] the respective roles of the contracting parties;[85] and the tenurial relationship of the contracting parties to the land in question.[86] Local communities could accordingly feasibly conclude such agreements with conservation authorities in respect of natural resources situated both within and outside the borders of formally proclaimed areas. Given the above flexibility, these agreements could be specifically tailored to suit the nature of the natural resources in question and the comparative needs of the conservation authorities and the local communities.

Notwithstanding their potential, no agreements of this nature have been concluded to date. There are several potential reasons for this: general public ignorance of the new

[77] Section 45.
[78] GN 214 *GG* No. 31968 dated 2 March 2009.
[79] Section 43(2).
[80] Section 43(2)(c).
[81] Section 44.
[82] The parties could include one or more individuals, government authorities, conservation organisations and communal property associations.
[83] The agreement could relate to a single property or many properties, situated adjacent to or at a distance from one another.
[84] The agreements' objectives could relate to formally listed threatened and protected species and ecosystems, and unlisted species and ecosystems deemed warranting special conservation attention.
[85] The roles of the parties could include undertaking tangible management actions and providing funding and/or technical support.
[86] The parties could own the land or not; or have some other form of tenurial relationship to it such a servitude, lease or right of use.

biodiversity regime; the absence of certain planning preconditions;[87] uncertainty regarding the nature, format and procedural formalities for concluding such agreements; and the absence of incentives encouraging their conclusion and rewarding their implementation.[88]

3.1.2 *National Environmental Management: Protected Areas Act*

The second component of the nation's new conservation regime is the Protected Areas Act. It introduces a fundamental shift in approach to establishing and managing protected areas, as is evident from the express objectives of the Act.[89]

As in the regulation of biodiversity generally, the Government is appointed as the trustee of South Africa's protected areas.[90] While preserving the validity of various forms of current protected areas,[91] the Protected Areas Act provides for the declaration of four additional types of protected areas, namely: special nature reserves;[92] national parks;[93]

[87] The Minister/MEC is yet to declare any bioregions or approve any bioregional plans. Until such time as the latter are approved, no biodiversity management agreements can be implemented.

[88] See further: Paterson A "A Legal Critique of Recent Contractual Tools Aimed at Facilitating the Domestic Implementation of the Convention on Biological Diversity: A South African Perspective" (2007) Unpublished paper presented at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, June 2007, 12-15.

[89] The objectives include: creating a national system of protected areas as part of a broader strategy to manage and conserve the nation's biodiversity; establishing a representative network of protected areas on state, private and communal land; promoting the sustainable utilisation of protected areas for the benefit of the people; and promoting the participation of local communities in the management of protected areas (section 2).

[90] Section 3(a).

[91] These include: provincial protected areas declared in terms of the provincial conservation ordinances and Acts (section 12); world heritage sites declared and regulated under the World Heritage Convention Act (section 13); marine protected areas declared and regulated under the Marine Living Resources Act (section 14); forest nature reserves and forest wilderness areas declared and regulated under the National Forests Act (section 15); and mountain catchment areas declared and regulated under the Mountain Catchment Areas Act (section 16).

[92] These may be declared by the Government: to protect highly sensitive areas, outstanding ecosystems, species, geological or physical features; or to make the area available primarily for scientific research (section 18(2)).

[93] These may be declared by the Government: to protect an area of national or international biodiversity importance; to prevent exploitation or occupation inconsistent with the protection of the ecological integrity of the area; to provide spiritual, scientific, educational, recreational and tourism opportunities which are environmentally compatible; and, where feasible, to contribute to economic development (section 20(2)).

nature reserves;[94] and protected environments.[95] Protected areas can generally be declared in respect of private and communal land if the owner/s has/have consented to the declaration by way of written agreement.[96] Provision is made for these agreements to be registered against the title deeds of the land concerned and they are therefore binding on successive owners.[97]

The authorities are required to assign the management of the protected area to a management authority[98] that must prepare and submit a management plan for approval.[99] The content of the management plan will effectively identify the conservation-related activities to be undertaken by the management authority. Provision is made for monitoring compliance with these plans and restricting various activities in these areas.[100] Finally, the Protected Areas Act sets out the powers and functions of South African National Parks (SANParks), the authority responsible for managing the nation's national parks.[101]

The Protected Areas Act specifically directs that its implementation must take place in partnership with the people.[102] To facilitate the practical realisation of this ideal, the Act prescribes a range of mechanisms that feasibly provide for the implementation of CCAs. These, which are discussed in turn below, include provision for: the incorporation of communal land within protected areas; the communal management of protected areas;

[94] These may be declared by the Government for a number of purposes, including: to supplement the system of national parks in South Africa; to protect areas which have significant natural features or biodiversity, are of scientific, cultural, historical or archaeological interest; to protect areas which are in need of long-term protection; and to provide for a sustainable flow of natural products and services to meet the needs of a local community (section 23(2)).
[95] These may be declared by the Government for a number of purposes, including: to regulate the area as a buffer zone for the protection of other forms of protected areas; to enable owners to take collective action to conserve biodiversity on their land and to seek legal recognition for this; to protect the area if it is sensitive to development; and to protect a specific ecosystem outside a special nature reserve, national park, world heritage site or nature reserve (section 28(2)).
[96] See: section 18(3) (special nature reserves); section 20(3) (national parks); and section 23(3) (nature reserves). No formal written agreement is required in respect of private land declared as a protected environment although the consent of the landowner is required (section 28(3)).
[97] See section 35(3) and section 36.
[98] Section 38.
[99] Section 39.
[100] Chapter 4 (Parts 2-4) of the Protected Areas Act.
[101] The powers and functions of SANParks are prescribed in Chapter 5 of the Act.
[102] Section 3(b).

communal access and use rights in respect of biological resources situated within protected areas; and the equitable sharing of benefits derived from such use.

Prior to the implementation of the Protected Areas Act, it was predominantly state land that was incorporated within protected areas. However, as has been mentioned above,[103] the Government has been compelled to turn to private and communal landowners to reach its international targets owing to the unavailability of suitable state land.

Express provision is made for the incorporation of private land and communal land within all four types of protected areas prescribed under the Protected Areas Act. The mechanism regulating this process is generally a written agreement entered into between the landowner/s and the Government.[104] The initiation of this process is fortunately not the preserve of the Government and can be initiated by landowners acting individually or collectively.[105] These agreements are recorded in a notarial deed and registered against the title deed of the property.[106] This effectively constitutes the Government's first attempt to recognise the notion of conservation servitudes in South Africa.

The second manner in which the Government has sought to enter into partnerships with the public relates to managing protected areas. Once established, the Government must in writing assign the management of the protected area to a management authority.[107] Such assignment can only take place with the concurrence of the prospective management authority.[108] The range of persons or institutions to which this

[103] See Chapter 5 (Part 2).
[104] Agreements for incorporating private land within special nature reserves must be concluded with the Minister (section 18(3)). Agreements for incorporating private land within national parks must be concluded with the Minister or SANParks (section 20(3). Agreements for incorporating private land within nature reserves must be concluded with the Minister of relevant provincial MEC (section 23(3)). In respect of protected environments, no formal written agreement is required but the mere oral consent of the private landowner (section 28(3)).
[105] Section 35(1) and (2).
[106] Section 35 read with section 36.
[107] Section 38.
[108] Section 39(1).

function can be assigned includes suitable persons, organisations and organs of state. This feasibly enables the Government to devolve the management of protected areas to local communities. Where the local community owns the land in question and agreed to have it incorporated within a protected area, the local community would presumably be operating through a communal property institution. However, nothing precludes the devolution of management authority to other forms of community organisations that have no tenurial relationship to the land situated in the protected areas.

Once appointed, a management authority must prepare and submit a comprehensive management plan to the Government for approval.[109] The protected area must be managed in accordance with the management plan and mandatory content includes: planning measures, controls and performance criteria; programmes for the implementation of the plan and its costing; procedures for public participation; and the implementation of community-based natural resource management where appropriate.[110] Discretionary content includes: provisions aimed at developing economic opportunities within and adjacent to the protected area; the development of local management capacity; and financial and other support necessary to ensure the effective administration and implementation of the management plan.[111] Additional issues that must be considered in preparing these management plans are prescribed by way of regulation.[112]

Although the Protected Areas Act does not provide for the conclusion of a formal contract between the Government and the management authority, if one considers the management regime holistically, it effectively constitutes a form of contractual relationship, a 'management agreement', in that: the management authority must agree to its appointment;[113] the management plan sets out the reciprocal obligations of the state and the management authority; the content of the management plan needs to be

[109] Section 39.
[110] Section 41(1) and (2).
[111] Section 41(3).
[112] Regulation 57(2) of the *Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites* (GNR 1061 GG No. 28181 dated 28 October 2005).
[113] Section 39(1).

approved by both parties; and provision is made for the termination of the management relationship if the appointed management authority fails to comply with the terms thereof.[114] These management agreements provide an important mechanism for the Government to share the responsibility and cost of managing South Africa's protected areas, which in the past largely fell within its exclusive purview, with local communities.

Finally, in line with the shift in the Protected Areas Act toward a more human-centred approach to conservation, the Act expressly recognises the need to enable the public to access, use and share any benefits derived from the use of natural resources situated within protected areas.[115] One of the key mechanisms for facilitating the practical implementation of this approach is once again an array of agreements, the availability and applicability of which is dependent on a community's relationship to the land.

Where a community owns the land, it will be the agreement providing for the incorporation of communal land within the protected area that will regulate access, use and benefit-sharing. Where a community has been appointed to manage the area, it will be the management agreement that regulates such issues. The Protected Areas Act even caters for those situations where a community is neither the landowner nor the management authority. First, the mandatory content for all management plans includes: procedures for public participation by local communities and interested parties; and, where appropriate, the implementation of community-based natural resource management (CBNRM).[116] The management agreements could therefore potentially regulate access, use and benefit-sharing issues although no guidance is unfortunately provided as to what these 'procedures' relate to and when it would be 'appropriate' to provide for CBNRM. Secondly, the Protected Areas Act provides for the conclusion of a co-management agreement between a management authority and relevant local communities to regulate issues of access, use and benefit-sharing.[117] Thirdly, even in

[114] Section 44.
[115] This is reflected in the Protected Areas Act's objectives (s 2(e)-(f)) and the purposes for which protected areas can be declared (section 17(h)-(k)).
[116] S 41(2)(e)-(f).
[117] S 42. The provisions regulating co-management agreement appear to anticipate such a scenario as the express purpose of these agreements is to facilitate co-management of the area or the regulation of

the absence of these management agreements and co-management agreements, the Act affords management authorities of certain protected areas discretion to enter into written agreements with local communities residing within or adjacent to a protected area, to regulate access and use issues specifically.[118]

Relatively detailed formalities have been prescribed by way of regulation to govern these latter agreements concluded with local communities in relation to special nature reserves, national parks and world heritage sites.[119] A management authority can grant access and use rights by way of a license, permit or agreement.[120] Furthermore, the rights so granted must comply with any relevant management plan or co-management agreement,[121] the management authority must keep a register of all such rights granted,[122] and report annually thereon to the Minister.[123] These requirements will be mimicked in the context of nature reserves when the applicable regulations are finalised.[124]

The use of the above mechanisms for facilitating the practical implementation of CCAs in South Africa has been sporadic, to say the least. While numerous land incorporation agreements have been concluded between the Government and private landowners in the past three years, no such agreements have been concluded in respect of communal land. No community has been formally appointed as the management authority either in respect of land it owns, or in respect of land owned by another. Furthermore, no

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human activities that affect it. They can provide for: the apportionment of income generated from the management of the area or benefit-sharing between the parties; the use of biological resources; access; occupation; and the development of economic opportunities within and adjacent to the area (section 42(2)).

[118] These are national parks, special nature reserves, nature reserves and world heritage sites (s 50(1) of the Protected Areas Act read together with the *Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites* (2005).

[119] The *Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites* (2005) specifically empower a management authority to grant access by way of a license, permit or agreement

[120] Regulation 5 read with regulation 31.

[121] Regulation 32.

[122] Regulation 33.

[123] Regulation 7(1)(a).

[124] *Draft Regulations for the Proper Administration of Nature Reserves* (published for comment in GN 1029 *GG* No. 32472 dated 3 August 2009). See regulations 19-22 (the use of biological resources in nature reserves) and regulation 23 (access to nature reserves).

agreements regulating access to and the use of biological resources situated within protected areas have been concluded to date. The reasons for this are not well documented and may stem from: a lack of capacity and awareness owing to the novelty of the statutory framework; a lack of clarity regarding the form, content and procedures for concluding many of these agreements; a failure to effectively 'market' these agreements through provision of associated incentives; entrenched scepticism among existing conservation and management authorities towards granting access and use rights to local communities; and historic distrust on the part of communal land reform beneficiaries of the benefits of venturing into the realm of conservation.[125] The validity of each of the above is considered in the context of the case studies discussed in Chapter 8.

3.2 POLICIES, PLANS AND PROGRAMMES

Complementing the above array of statutory mechanisms of relevance to the practical implementation of CCAs in South Africa, are several initiatives introduced by national and provincial authorities in the past five years. The most important of these are in chronological order: *Guidelines for the Implementation of CBNRM in South Africa;* [126] *Stewardship Programmes;* the *People and Parks Programme*; the *National Protected Areas Expansion Strategy;*[127] the *National Spatial Biodiversity Assessment;*[128] the *National Biodiversity Strategy and Action Plan*;[129] and the *National Biodiversity Framework.*[130]

[125] For a discussion of these mechanisms and the necessary prerequisites for their implementation, see: Paterson "A Legal Critique of Recent Contractual Tools Aimed at Facilitating the Domestic Implementation of the Convention on Biological Diversity" (2007) 21-33.
[126] Department of Environmental Affairs and Tourism *Guidelines for the Implementation of Community-Based Natural Resource Management (CBNRM) in South Africa* (2003).
[127] Government of South Africa *National Protected Areas Expansion Strategy for South Africa 2008* (2009).
[128] Driver A, Maze K, Rouget M, Lombard A, Nel J, Turpie J, Cowling R, Desmet P, Goodman P, Harris L, Jonas Z, Reyers B, Sink K & Strauss T *National Spatial Biodiversity Assessment 2004: Priorities for Biodiversity Conservation in South Africa* (2005) *Strelitzia* 17, South African National Biodiversity Institute.
[129] Department of Environmental Affairs and Tourism *South Africa's National Biodiversity Strategy and Action Plan* (2005).
[130] *National Biodiversity Framework* (published in GN 813 *GG* No. 32474 dated 3 August 2009).

3.2.1 *Guidelines for Implementation of CBNRM in South Africa*

The first comprehensive attempt by the Government to integrate the concerns of conservation and people was the publication of the *Guidelines for the Implementation of Community Based Natural Resource Management (CBNRM) in South Africa* (the *Guidelines*) in 2003. The objectives of the *Guidelines* are to promote a shared understanding of what is CBNRM; improve co-operation between all relevant stakeholders; and clarify the respective roles and responsibilities of these stakeholders. Highlighting the need to adopt an adaptive management approach to implementing CBNRM, the key value of the *Guidelines* appears to lie in the distillation of seven key principles necessary for implementing CBNRM.[131] The document identifies a series of guidelines for implementing each of these principles[132] and for: all parties involved in a CBNRM projects;[133] communities;[134] third parties assisting with the implementation of CBNRM projects;[135] and policy-makers.[136] The guidelines for policy-makers are particularly noteworthy.[137] They should have informed the decisions and actions of Government in developing and implementing its legislative framework of relevance to CCAs during the course of the past half-decade. However, if one considers the concerns emanating from local communities attending the three previous People and

[131] These principles are: communities must maintain a variety of different ways of earning a living; the natural resource base must be maintained, and even improved, to ensure that it can continue to support current and future livelihoods; local organisations, working in partnership with government and community organisations, must actively manage local resources for the benefit of local people and the environment; people must receive real benefits (economic, social, cultural and spiritual) for managing the natural resources wisely; there must be effective policies and laws and these must be implemented, wherever possible, in partnership with local peoples legitimate and representative organisations; outside assistance must be provided to support local projects and local people's knowledge and experience must be respected; local leadership structures must be identified, understood and involved in the CBNRM projects (*Guidelines for Community-Based Natural Resource Management in South Africa* (2003) 21).
[132] *Guidelines for Community-Based Natural Resource Management in South Africa* (2003) 22-42.
[133] *Guidelines for Community-Based Natural Resource Management in South Africa* (2003) 45-48.
[134] *Guidelines for Community-Based Natural Resource Management in South Africa* (2003) 49-52.
[135] *Guidelines for Community-Based Natural Resource Management in South Africa* (2003) 53-56.
[136] *Guidelines for Community-Based Natural Resource Management in South Africa* (2003) 57-60.
[137] These guidelines include: involving communities and being open to new approaches; policy papers must be easy to understand and easy to get hold off; national and provincial policies should provide the basis for local rules; the aim should be to eventually hand authority to the resource users themselves and clear conditions need to be set for handing over such authority; everyone affected by the project should be included; provision must be made for building capacity, barriers between departments and agencies must be broken down; all relevant information must be sourced and disclosed prior to implementing the project; and communities should benefit financially and otherwise from the project.

Parks Conferences, discussed below,[138] there appears to be a clear disjuncture between theory and practice.

3.2.2 *Stewardship Programmes*

National and provincial conservation authorities have implemented various stewardship programmes aimed at promoting the wise use and management of natural resources situated on private and communal land in South Africa. The two most well established provincial programmes are *CapeNature's Stewardship Programme*[139] and *Ezemvelo KZN Wildlife's Biodiversity Stewardship Programme*.[140] In recognition of the success of these programmes and to facilitate the development of similar initiatives in all provinces, the Department of Environmental Affairs recently established *Biodiversity Stewardship South Africa*.[141]

These programmes generally aim to: create innovative alternative mechanisms for securing private and communal land for conservation; create a network of diverse conservation areas in the landscape; provide landowners who commit their property to conservation tangible rewards for doing so; and to expand conservation by encouraging commitment to, and the implementation of good biodiversity management practices on private and communal land.[142] To do so, they promote four main stewardship options that vary with respect to the degree of formal protection, the duration of protection and the level of potential benefits accruing to landowners who enter the programme. These are: contract nature reserves;[143] biodiversity agreements;[144] protected environments;[145]

[138] See Part 3.2.3 below.
[139] For further information on the *CapeNature Stewardship Programme* see: http://www.capenature.org.za/ and www.capestewardship.co.za/.
[140] For further information on Ezemvelo KZN Wildlife's Biodiversity Stewardship Programme see: http://www.kznwildlife.com/index.php?/Stewardship.html.
[141] For further information on *Biodiversity Stewardship South Africa*, see: http://www.stewardship.co.za/.
[142] See further: Ezemvelo KZN Wildlife KZN *Biodiversity Stewardship: Conservation in Landowner's Hands* (available at www.kznwildlife.com); and CapeNature *Conservation in Landowners Hands* (available at www.capenature.co.za).
[143] Nature reserves are constituted by way of a written agreement entered into between the conservation authorities and the landowner in terms of section 23 of the Protected Areas Act. The formalities relating to their establishment and management are formal and their duration long term.
[144] Biodiversity agreements are constituted by way of a written agreement entered into between the

and conservation areas.[146] The relationship between these four stewardship options is depicted in the Figure 3 below.

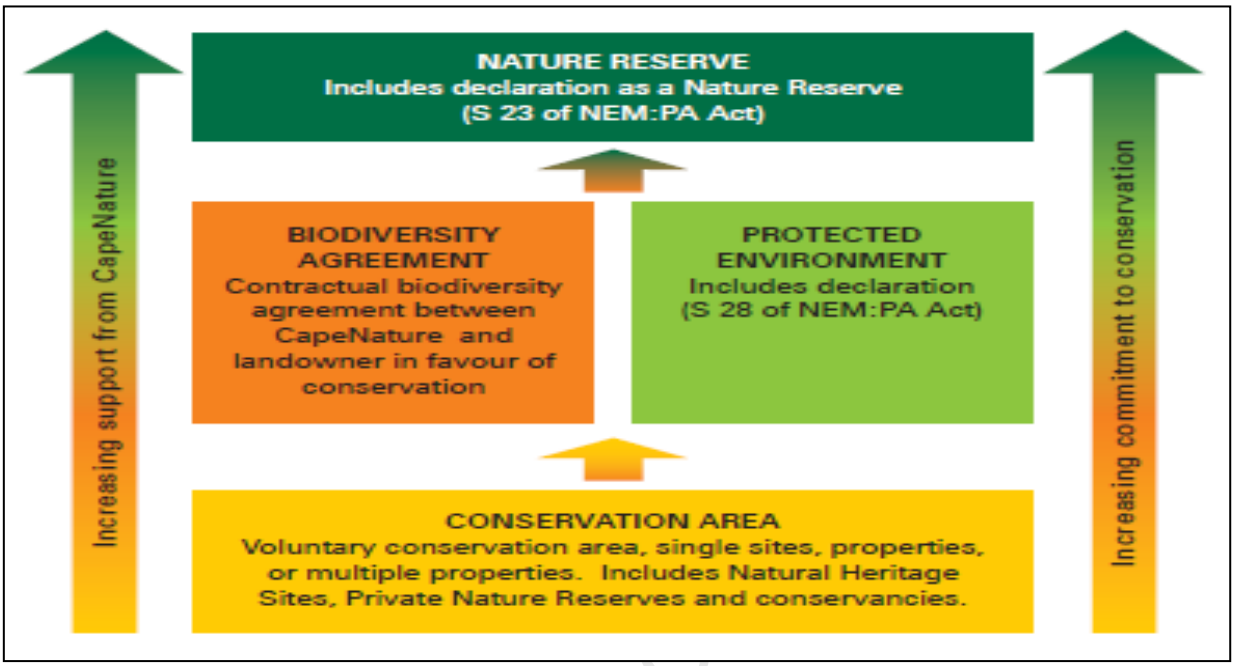

FIGURE 3: Stewardship Options[147]

The diverse array of stewardship options affords conservation authorities and landowners alike a great degree of flexibility to tailor conservation solutions to suit a specific context. While extensively implemented on private land, the successful implementation with respect to communal land is yet to be fully realised.[148] It is

conservation authority and the landowner. The formalities relating to their establishment and management are less formal and their duration medium term (not less than 10 years). While not expressly stating so, these would appear to mimic the biodiversity management agreements prescribed in section 44 of the Biodiversity Act.

[145] Protected environments are constituted by way of a written agreement entered into between the conservation authority and the landowner in terms of section 28 of the Protected Areas Act. The formalities relating to their establishment and management are similarly less formal and their duration is not prescribed.

[146] No statutory formalities are prescribed for the establishment and management of conservation areas. They are accordingly the most flexible option with no defined period of commitment. They are generally constituted by registering the area with the relevant provincial conservation authority.

[147] CapeNature *Conservation in Landowners Hands* (available at www.capenature.co.za).

[148] In the Western Cape, for example, CapeNature has successfully established thirty-three nature reserves, seventeen biodiversity agreement and twenty one conservation areas on private land since the establishment of the programme in 2003 (Cape Nature *Quantified Report 2008/2009* (2009) 58; CapeNature *Annual Report 2008/2009* (2009) 12-13). However, no similar successes have been recorded in respect of communal land.

interesting to note in this regard, that the Department of Land Affairs in partnership with the South African National Biodiversity Institute, plan to implement the *National Land Reform Biodiversity Stewardship Initiative* shortly, which aims to extend the application of the stewardship model to land subject to land reform areas with high biodiversity value.[149]

3.2.3 *People and Parks Programme*

Initiated by the former Department of Environmental Affairs and Tourism in 2003, this programme seeks to expand community involvement in the management and use of protected areas, and to build improved stakeholder liaison structures between conservation authorities and local communities. The key impetus for this programme has been built around a series of biennial People and Parks Conferences.[150] If one surveys the proceedings of the three conferences which have been held to date, the common issues subject to debate are how to: build government and local community capacity; promote greater access, use and benefit-sharing within protected areas; reconcile the objectives and procedures of South Africa's land reform and conservation agendas; create a better post-settlement support framework for successful land claimants; clarify the practical implementation of the co-management governance model; build effective community public private partnerships on land restored to local communities; and strengthen and extend South Africa's protected areas network in a manner that does not undermine local communities.[151] The Government has undertaken several measures in the past few years to address these issues, including: the publication of biennial *Peoples and Park Action Plans* which effectively constitute

[149] See further: CAPE, CEPF, South African National Biodiversity Institute & Wilderness Foundation *Biodiversity Briefing Series No.2* (2010).
[150] Department of Environmental Affairs and Tourism *Outcomes of the 2004 People and Parks Workshop* (2004); Department of Environmental Affairs and Tourism *2nd People and Parks Conference Report* (2006); and Department of Environmental Affairs and Tourism *3rd People and Parks Conference Report* (2008).
[151] These sentiments are clearly reflected in the *Swadini Statement* (attached to *Outcomes of the 2004 People and Parks Workshop* (2004) 6-7); *Beaufort West Declaration and Community Statement* (attached 2nd *People and Parks Conference Report* (2006) 14-17) and the *Mafikeng Declaration* (3rd *People and Parks Conference Report* (2008) 15-17).

two-year implementation programmes;[152] the signing of a *Memorandum of Agreement* between the erstwhile Minister of Agriculture and Land Affairs and Minister of Environmental Affairs and Tourism to expedite the resolution of land claims situated within protected areas;[153] the development of a *National Co-Management Framework* to guide the settlement of these claims;[154] the publication of a *National Protected Areas Expansion Strategy;*[155] and the establishment of a People and Parks Steering Committee[156] and national park forums.[157]

However, notwithstanding these very tangible measures emanating from the *People and Parks Programme* in the past few years, it appears that the objectives of the Programme are far from being realised. As reflected in the proceedings of the 3rd People and Parks Conference held in 2008, the success of this programme is somewhat chequered. Communities remain troubled by the bulk of issues raised at the first two conferences and have grave concerns about the utility of the measures implemented by the Government in the past two years to resolve them.[158] These concerns have been complemented by additional emerging issues such as: lack of political buy-in by national, provincial and municipal authorities; lack of accountability from some conservation authorities and government departments; protracted land claim

[152] These bi-annual *Action Plans* are contained within the Conference Proceedings (see note 150 above). See for example: *2nd People and Parks Conference Report* (2006) 20-41; and *3rd People and Parks Conference Report* (2008) 29-37.

[153] Minister of Agriculture and Land Affairs and Minister of Environmental Affairs and Tourism *Memorandum of Agreement,* dated 2 May 2007. The agreement sets out the respective roles and responsibilities of these departments when dealing with land claims within protected areas. This agreement is discussed more fully in Chapter 7 (Part 2.1) below).

[154] Department of Environmental Affairs *National Co-Management Framework* (2010). This *National Co-Management Framework* is discussed more fully in Chapter 7 (Part 2.2).

[155]Government of South Africa *National Protected Areas Expansion Strategy for South Africa 2008* (2009). The objective of the *Strategy* is to achieve cost effective protected area expansion for ecological sustainability and increased resilience to climate change. The *Strategy* prescribes targets for protected area expansion, contains maps of the most important areas for protected area expansion, and makes recommendations on mechanisms for protected area expansion. This *Strategy* is discussed more fully in Chapter 5 (Part 3.2.6).

[156] The People and Parks Steering Committee, established in 2007, comprises of representatives from national and provincial government, conservation authorities and local communities. Its purpose is to guide the implementation of the *People and Parks Programme*. The role of the Steering Committee is discussed more fully in Chapter 5 (Part 3.3.3).

[157]The aim of this initiative is to establish a park forum for each national park. These forums include representatives from SANParks, surrounding communities, local stakeholders and other interested and affected parties. The role of these Park Forums is discussed more fully in Chapter 5 (Part 3.3.3).

[158] *3rd People and Parks Conference Report* (2008) 23-29.

processes; lack of post-settlement support; and insufficient information sharing, awareness and communication strategies at the local level.[159] The relationship between people and parks, and conservation and land reform is clearly far from settled.

3.2.4 *National Spatial Biodiversity Assessment*

The *National Spatial Biodiversity Assessment* (*NSBA*), commissioned by the Department of Environmental Affairs and Tourism and published in 2005, primarily contains a spatial assessment of South Africa's biodiversity and an overview of key issues, constraints and opportunities for conserving it. The three key strategies for conserving South Africa's biodiversity emerging from this assessment are: focussing emergency action on threatened ecosystems; expanding the formal protected areas framework; and pursuing options for linking biodiversity and socio-economic development. The latter two priorities are of specific relevance to CCAs given their potential to expand the protected areas network and the need for them to contribute to local economic development to ensure their viability and sustainability.[160] The *NSBA* furthermore notes the vital role played by municipalities in this regard and recommends building their capacity to include biodiversity opportunities and constraints in their integrated development planning.[161]

3.2.5 National Biodiversity Strategy and Action Plan & National Biodiversity Framework

The *National Biodiversity Strategy and Action Plan* (*NBSAP*) was launched by the former Department of Environmental Affairs and Tourism in 2006 and is informed by the *NSBA*. The *NBSAP* highlights five primary strategic objectives, specifies a range of activities to realise each of these objectives, and sets short-term (5-year) and long-term (15-year) targets and outcomes for each of these objectives.[162] References to

[159] *Mafikeng Declaration* and *Community Statement* contained within the *3rd People and Parks Conference Report* (2008) at 15 and 38 respectively.
[160] *National Spatial Biodiversity Assessment* (2005) *x*.
[161] Ibid.
[162] The five strategic objectives are: enhanced institutional effectiveness and efficiency ensuring good governance in the biodiversity sector; an enabling policy and legislative framework integrating biodiversity

communities and communal landowners are littered throughout the document. Communal landowners are expressly acknowledged as important stakeholders in the implementation of the *NBSAP*.[163] Owing to the extensive communal use of natural resources situated within and outside of protected areas, the *NBSAP* identifies the need to encourage communal landowners to conserve the natural resources on their land voluntarily through the provision of appropriate incentives and support,[164] and to expand the protected areas system to include additional communal land.[165] To overcome the historical inequitable access to and use of natural resources, the *NBSAP* further promotes the forging of partnerships between Government, communities and the private sector, granting increased communal access and use rights in protected areas, promoting access to information and ensuring informed community participation in decision-making.[166]

The *National Biodiversity Framework* (*NBF*), published by the erstwhile Department of Environmental Affairs and Tourism in 2005, identifies 33 priority actions to be undertaken in the next five years to give effect to the strategic objectives highlighted in the *NBSAP*. In doing so it seeks to provide a framework to co-ordinate and align the short-term efforts of the many organisations and individuals involved in conserving and managing South Africa's biodiversity. Given that the NBSAP specifically informed the *NBF*, it is not surprising to find the above sentiments of relevance to CCAs mimicked within its content.[167]

management objectives into the economy; integrated terrestrial and aquatic management across the country minimizing the impact of threatening processes on biodiversity, enhancing ecosystem services and improving social and economic security; human development and well-being enhanced through the sustainable use of biological resources and the equitable sharing of benefits; and a network of conservation areas conserving a representative sample of biodiversity and maintaining key ecological processes across the landscape and seascape.

[163] *National Biodiversity Strategy and Action Plan* (2005) 10, 71 & 73.
[164] *National Biodiversity Strategy and Action Plan* (2005) 27, 29, 57 & 71.
[165] *National Biodiversity Strategy and Action Plan* (2005) 18 & 69.
[166] *National Biodiversity Strategy and Action Plan* (2005) 62-63.
[167] *National Biodiversity Framework* (2009) 30, 60, 79 & 87.

3.2.6 *National Protected Areas Expansion Strategy*

The *National Protected Areas Expansion Strategy* (*NPEAS*), published in 2009, acknowledges that South Africa's protected areas network is currently inadequate[168] and aims to provide a strategy for promoting 'cost effective protected areas expansion for ecological sustainability and increased resilience to climate change'.[169] In order to do so, the *NPEAS* prescribes an array of targets for ensuring that a representative sample of South Africa's crucial ecosystems are conserved[170] and identifies forty-two large, intact and unfragmented areas of high conservation value deemed suitable for inclusion in large protected areas.[171] These areas crucially include those under communal ownership and it is therefore not surprising that the *NPEAS* expressly acknowledges the relationship between land reform and protected areas.[172]

The key legal mechanism that the *NPEAS* promotes for including additional communal land within the protected areas network is the contract agreements prescribed in the Protected Areas Act.[173] The nuanced options that have been implemented in the various provincial stewardship programmes[174] are identified as a model for tailor-making these contracts to suit the specificity of the particular area.[175] While it is hoped that the current array of fiscal incentives[176] will be sufficient to encourage communal landowners to enter into such contracts, it is acknowledged that further research is required into new instruments such as revolving trusts and payments for ecosystem services.[177]

[168] *National Protected Areas Expansion Strategy* (2009) 7.
[169] *National Protected Areas Expansion Strategy* (2009) 1.
[170] *National Protected Areas Expansion Strategy* (2009) 15-23.
[171] *National Protected Areas Expansion Strategy* (2009) 24-31.
[172] *National Protected Areas Expansion Strategy* (2009) 11-12.
[173] *National Protected Areas Expansion Strategy* (2009) 32-34. For a discussion of the contract agreements prescribed in the Protected Areas Act, see: Chapter 5 (Part 3.1.2).
[174] For a discussion of provincial stewardship programmes, see: Chapter 5 (Part 3.2.2).
[175] Ibid.
[176] A full discussion of these economic incentives unfortunately falls outside the purview of this dissertation. For further information, see: Paterson A "Considering Recent Developments in Environmental Fiscal Reform in South Africa" (2009) 16(1) *South African Journal of Environmental Law & Policy* 29-34; Paterson (2005) *South African Journal of Environmental Law & Policy* 97-121; and Paterson (2005) *South African Law Journal* 182-216.
[177] *National Protected Areas Expansion Strategy* (2009) 35-36.

Importantly, the *NPEAS* highlights the potential scope of protected areas to facilitate local economic development and to promote the diversification of rural livelihoods in those areas where other forms of land use are not viable.[178] In order to realise this potential, it advocates that communal landowners should be afforded full access to the economic opportunities associated with eco-tourism in protected areas.[179] No mention is made however of providing such landowners with rights of access, use and residence. Furthermore, placing the responsibility to implement the *NPEAS* under the exclusive preserve of national conservation authorities[180] may frustrate its realisation given the potential key role played by provincial conservation authorities, land reform authorities, traditional leadership institutions, park forums, communal property institutions and municipalities in the context CCAs.[181]

3.3 KEY INSTITUTIONS

South Africa clearly has a comprehensive statutory and policy framework for implementing CCAs. Equally comprehensive is the array of institutions responsible for its implementation.[182] These institutions span different national ministries, national departments and statutory authorities housed in all three spheres of government. It is the somewhat convoluted allocation of mandates between and across these institutions that is partially to blame for the slow domestic implementation of CCAs.

[178] *National Protected Areas Expansion Strategy* (2009) 12-13.
[179] *National Protected Areas Expansion Strategy* (2009) 12.
[180] The *NPEAS* provides that the primary implementers for the policy shall be: the Department of Environmental Affairs (including its Marine and Coastal Management Branch), South African National Parks; South African National Biodiversity Institute; and World Heritage Site Authorities. It is proposed to create a Protected Areas CEOs Forum (comprising of representatives from the above institutions) to coordinate the Strategy's implementation (*National Protected Areas Expansion Strategy* (2009) 37-38).
[181] For a discussion of the potential role played by these institutions, see: provincial conservation authorities and park forums (Chapter 5 (Part 3.3)); land reform authorities (Chapter 6 (Part 5.1)); communal property institutions (Chapter 6 (Part 5.2)); traditional leadership institutions (Chapter 6 (Part 5.3)); and municipalities (Chapter 9 (Part 7.1)).
[182] For a comprehensive overview of these institutions, see: Department of Environmental Affairs *Review of Institutional Arrangements for Management of Protected Areas* (2010).

3.3.1 *Ministries, Departments and Statutory Authorities*

Following the restructuring of the South African Cabinet by President Zuma in 2009, the administration of the bulk of national laws of relevance to conservation generally, and terrestrial protected areas in particular, were entrusted to the Minister of Water and Environmental Affairs. [183] The Department of Environmental Affairs (DEA)[184] and the Department of Water Affairs support the Minister in the administration of this mandate.[185] These Departments are in turn assisted in the administration of the national parks and biodiversity portfolios by two key statutory authorities, namely South African National Parks (SANParks) and the South African National Biodiversity Institute (SANBI). The former is generally responsible for administering the country's national parks and has a dedicated Directorate: People and Conservation.[186] The latter is generally responsible for more scientific enterprises such as biodiversity planning and monitoring.[187]

[183] GN 40 *GG* No. 32367 dated 1 July 2009.

[184] The relevant laws administered by the Department of Environmental Affairs are: Biodiversity Act; Environment Conservation Act; Marine Living Resources Act; National Environmental Management: Integrated Costal Management Act; National Parks Act; Protected Areas Act; Sea-Shore Act; and World Heritage Convention Act. In the context of protected areas, DEA has a dedicated Chief Directorate: Transfrontier Conservation and Protected Areas and three supporting Directorates: Transfrontier and Conservation Areas; Protected Areas and Development; and Protected Areas, Legislation and Compliance. In the context of conservation generally, DEA has a dedicated Chief Directorate: Biodiversity and Heritage and various supporting Directorates including: Biodiversity Conservation; Resource Use; and Regulation and Monitoring Services. For further information on DEA see its website (http://www.environment.gov.za/).

[185] The relevant law administered by the DWA is the Mountain Catchment Areas Act. For further information on DWA see its website (http://www.dwa.gov.za/).

[186] The powers and functions of SANParks are prescribed in Chapter 5 of the Protected Areas Act and include: managing national parks and other protected areas assigned to it in terms of the Act; protecting, conserving and controlling these national parks and the activities taking place within them; undertaking and promoting research within national parks; and, on the Minister's request, providing advice on any matter concerning the conservation and management of biodiversity generally, the proposed establishment or extension of a national park, or the exclusion of land from an existing national park (section 55). SANParks currently administers twenty-one national parks in South Africa.

[187] The powers and functions of SANBI are prescribed in Chapter 2 of the Biodiversity Act. While its primary functions do not encompass the day-to-day regulation of protected areas, many of them are of relevance to the planning and administration of these areas and include: monitoring and regularly reporting to the Minister on the status of the country's biodiversity, the conservation status of all listed threatened or protected species and the status of all listed invasive species; acting as an advisory and consultative body on biodiversity-related matters to organs of state and other biodiversity stakeholders; managing South Africa's national botanical gardens; establishing facilities for environmental education, visitor amenities and research; establishing collections of animals and micro-organisms in appropriate enclosures; collecting, generating, processing, coordinating and disseminating information about biodiversity and the sustainable use of indigenous biological resources; promoting research on

These are not however the only national institutions of relevance to administering protected areas in South Africa. The administration of the National Forests Act, which provides for the designation of forest reserves and wilderness areas has been entrusted to the Minister of Agriculture, Forestry and Fisheries,[188] supported by the Department Agriculture, Forestry and Fisheries (DAFF).[189] The administration of the majority of these areas has been, or is in the process of being, delegated to relevant provincial authorities.[190] The role of DAFF in the regulation of protected areas is therefore decreasing rapidly.

Owing to the fact that the environment and nature conservation are concurrent provincial constitutional competences, relevant ministerial and departmental structures are duplicated at the provincial level. These vary somewhat according to the provincial clustering of functions but all provinces have a relevant MEC, supported by an associated Department responsible, for environmental affairs, including conservation. Several of these Departments play a key role in the establishment, regulation and management of various forms of protected areas declared under both national and provincial legislation, including: world heritage sites; provincial nature reserves; protected environments; mountain catchment areas.[191] Other provinces have assigned this entire function, or a portion of it, to provincial conservation authorities such as: Cape Nature;[192] Eastern Cape Parks and Tourism Agency;[193] Ezemvelo KZN Wildlife;[194]

indigenous biodiversity and the sustainable use of indigenous biological resources; coordinating programmes for the rehabilitation of ecosystems and the prevention, control or eradication of listed invasive species; and assisting the Minister in the exercise of their powers, including providing advice on listed ecosystems, the implementation of the Act and any international agreements, the identification of bioregions and the contents of any bioregional plans, other aspects of biodiversity planning, the management and conservation of biological diversity, the sustainable use of indigenous biological resources, and the management of, and development in, national protected areas (section 11).

[188] GN 40 *GG N*o. 32367 dated 1 July 2009.

[189] For further information on DAFF see its website (http://www.nda.agric.za/).

[190] *National Protected Areas Expansion Strategy* (2009) 35.

[191] These Departments are: Eastern Cape Department of Economic Development & Environmental Affairs; Free State Department of Tourism, Economic & Environmental Affairs; Gauteng Department of Agriculture, Conservation & Environment; Limpopo Department of Economic Development, Environment and Tourism; and Northern Cape Department of Tourism, Environment & Conservation.

[192] In the Western Cape, special nature reserves, provincial nature reserves, world heritage sites, protected environments and mountain catchment areas are administered by CapeNature, regulated under the Western Cape Nature Conservation Laws Amendment Act (3 of 2000).

Mpumalanga Tourism and Parks Agency;[195] and the North West Parks and Tourism Board.[196]

The role of the local sphere of Government in the administration of protected areas is far more sporadic. Although conservation is not a local constitutional competence, several well-resourced metropolitan, district and local municipalities continue to administer local nature reserves.[197] Their role is, however, on the decrease as less resourced district and local municipalities seek to shed this unfunded mandate.[198]

3.3.2 *Management Authorities*

As has been highlighted above, the Protected Areas Act compels the Minister to assign the management of all 'protected areas'[199] to a management authority, which can be a suitable person, organisation or organ of state.[200] The management of national parks must, however, be assigned to SANParks.[201] While the management of the bulk of the country's national parks, special nature reserves, provincial and local nature reserves

[193] In the Eastern Cape, provincial nature reserves are administered by the Eastern Cape Parks and Tourism Agency, established in terms of the Eastern Cape Parks and Tourism Act (2 of 2010). Protected environments and mountain catchment areas remain under the administration of the Eastern Cape Department of Economic Development & Environmental Affairs.
[194] In KwaZulu-Natal, provincial nature reserves, marine protected areas and world heritage sites are administered by Ezemvelo KZN Wildlife, established in terms of the KwaZulu-Natal Nature Conservation Management Act (9 of 1997).
[195] In Mpumalanga, provincial nature reserves are administered by the Mpumalanga Tourism and Parks Authority, established in terms of the Mpumalanga Tourism and Parks Agency Act (5 of 2005).
[196] In North West, provincial nature reserves and world heritage sites are administered by North West Parks and Tourism Board, originally established in terms of the (Bophuthatswana) National Parks Act (24 of 1987).
[197] These local nature reserves were proclaimed under the Environment Conservation Act and/or provincial conservation Ordinances and Acts. Examples of municipal authorities that continue to administer local nature reserves include: Buffalo City Metropolitan Municipality; City of Cape Town Metropolitan Municipality; City of eThekwini Metropolitan Municipality; and Overstrand Local Municipality.
[198] *National Protected Areas Expansion Strategy* (2009) 37-38.
[199] The term 'protected area' is defined as 'any of the protected areas referred to in section 9' (section 1). The kinds of protected areas listed in section 9 include: special nature reserves; national parks; nature reserves; wilderness areas; protected environments; world heritage sites; marine protected areas; specially protected forest areas; forest nature reserves; forest wilderness areas; and mountain catchment areas.
[200] Section 38 read with section 37.
[201] Section 38(1)(aA).

has been assigned to government authorities,[202] the management of many local and private nature reserves has been assigned to private and communal landowners. The array of authorities appointed to manage South Africa's natural world heritage sites under the World Heritage Convention Act is equally diverse and includes specially constituted statutory authorities,[203] provincial Ministers[204] and provincial conservation agencies.[205] Given the broad powers afforded to these management authorities, they have a key role to play in both managing CCAs, and promoting access to and the use of such areas by communities living in close proximity to them.

While the above mêlée of institutions manage statutorily prescribed areas, it would be amiss not to mention the role of private and communal landowners in managing non-statutory protected areas. These predominantly take the form of conservancies and game farms that at the last available estimate spanned some 13 % of private and communally owned land in South Africa.[206]

3.3.3 *Advisory Institutions*

Several statutory and non-statutory advisory forums, of key relevance to facilitating CCAs in South Africa, have arisen during the course of the past decade.

The most important of these from a national perspective is the People and Parks Forum initiated in 2004. It comprises of representatives from relevant government departments, conservation authorities, tribal authorities, communities and non-government organisations who meet on a biennial basis to discuss the implementation of the People

[202] These include the array of authorities discussed in Chapter 5 (Part 3.3.1).
[203] For example: ISimangaliso Wetland Park Authority, a statutory authority constituted under the World Heritage Convention Act, is the appointed management authority for the ISimangaliso Wetland Park World Heritage Site (previously known as the Greater St Lucia Wetland Park).
[204] For example: the MEC for Sports, Arts and Culture in the Northern Cape Province is the appointed management authority for the Richtersveld Cultural and Botanical Landscape World Heritage Site.
[205] For example: Ezemvelo UKZN Wildlife is the appointed management authority for the UKhahlamba Drakensberg Park World Heritage Site.
[206] Department of Environmental Affairs and Tourism *People, Parks and Transformation in South Africa: A Century of Conservation, A Decade of Democracy* (2003) 52.

and Parks Programme.[207] The management of the People and Parks Forum is overseen by the National People and Parks Steering Committee established in 2004. Its membership, which initially comprised of government representatives, was expanded to include members of the Community Task Team established in 2006. The Community Task Team comprises of community representatives from each of the nine provinces, and was specifically established to allay concerns over the lack of community participation in the decision-making of the National People and Parks Steering Committee.[208]

To facilitate the implementation of the People and Parks Programme at the provincial level, various Provinces have established, or are in the process of establishing, People and Parks Steering Committees (in some Provinces referred to as People and Parks Forums), comprising of relevant provincial conservation authorities and community representatives.[209] In the context of national parks, SANParks has over the past six years undertaken a similar initiative at the local level by establishing individual park forums in the majority of national parks in South Africa.[210] These park forums include representatives from SANParks, surrounding communities, local stakeholders and other interested and affected parties. Their purpose is to encourage active participation in the management of the national park, and to act as a discussion forum for issues affecting the park and its surrounding communities. The ambit of this initiative unfortunately does not extend to the many other forms of protected areas prevalent in South Africa.

The Protected Areas Act, however, provides for the establishment of advisory committees for various other forms of protected areas, the membership and mandate of which is sufficiently broadly defined to include community representation and the facilitation of community-based natural resource management.[211] Provision is also

[207] For a discussion on the *People and Parks Programme*, see Chapter 5 (Part 3.2.3).
[208] *2nd People and Parks Conference Report* (2006) 12-13.
[209] Provinces to have established Provincial People and Parks Steering Committees/Forums include: North-West; Kwazulu-Natal; Limpopo; and Western Cape (*3rd People and Parks Conference Report* (2008) 79, 83, 85 & 98). The Eastern Cape is in the process of establishing a Provincial Steering Committee (3rd *People and Parks Conference Report* (2008) 90).
[210] SANParks *Annual Report (2008/2009)* (2009) 7.
[211] Regulations 50-55 of *Regulations for the Proper Administration of Special Nature Reserves, National*

made in contemporary provincial conservation legislation for establishing local conservation boards, the express purpose of which is to 'promote local decision-making regarding the management of nature conservation and heritage resources within protected areas'.[212] These advisory committees and local conservation boards clearly provide opportunities for establishing the equivalent of 'park forums' in many other forms of protected areas.

4. CONCLUSION

Within this chapter I traversed South Africa's extensive conservation regime of relevance to CCAs. I discussed the significant reforms of the past five years that promote a far more inclusive, participatory and human-centred approach to conservation. I highlighted the number of mechanisms inherent in these reforms for implementing CCAs in South Africa. These include provision for local communities to enter into biodiversity management agreements with government authorities under the Biodiversity Act; and the ability of local communities to contract their communal land into protected areas, to be appointed as management authorities, to enter into co-management agreements with existing management authorities, and to enter into access and use arrangements with existing management authorities under the Protected Areas Act. I finally considered several recent policies and programmes which have sought to facilitate the implementation of these mechanisms and the exceedingly diverse array of institutions tasked with doing so.

Parks and World Heritage Sites (2005). Provision for the establishment of advisory committees for nature reserves is made in Regulations 12-17 of the *Draft Regulations for the Proper Administration of Nature Reserves* (2009). The membership of these advisory committees can include 'community organisations, non-governmental organisations, residents of and neighbouring communities to' the protected area (see Regulation 51(a)) *Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites* (2005) and Regulation 13(a) of the *Draft Regulations for the Proper Administration of Nature Reserves* (2009)).

[212] See section 25-39 of the Kwazulu-Natal Nature Conservation Management Act (9 of 1997). The potential membership of any local conservation board is diverse but must 'ensure a balance between tribal authorities, regional councils and other municipalities, community-based organisations, the business sector, environmental groups, farming associations and other interested parties' (section 25(4)(c)). Pilot projects are underway to establish local conservation boards in several protected areas in Kwazulu-Natal (see further http://www.kznwildlife.com/index.php?/Local-Boards.html).

All told, South Africa's contemporary conservation regime holds great potential for implementing CCAs. Notwithstanding its promulgation over five years ago, the use of the mechanisms inherent in it for doing so has been disconcertingly sporadic. What is furthermore disconcerting is that the majority of these mechanisms were absent during the first decade of South Africa's land reform programme. In their absence, the country's land reform authorities were compelled to fashion their own mechanisms when restoring communal land situated within protected areas. These mechanisms, the majority of which are still prevalent today, effectively constituted South Africa's first efforts to introduce CCAs.

It is therefore not surprising that the country's legal framework of relevance to CCAs sits somewhat uncomfortably between the conservation domain and the land reform domain. One cannot read the one without the other and it is accordingly to an analysis of South Africa's relevant land reform regime that this analysis now turns.

CHAPTER 6

SOUTH AFRICA'S LAND REFORM REGIME OF RELEVANCE TO COMMUNALLY-CONSERVED AREAS

1. INTRODUCTION

South Africa's pre-constitutional land regime embedded a ruthless system of racially-based dispossession and forced removals. This system was founded on a diverse array of laws including the Native Land Act,[1] Black Administration Act,[2] Development Trust and Land Act,[3] Group Areas Act,[4] Prevention of Illegal Squatting Act,[5] Black Authorities Act[6] and Blacks Resettlement Act.[7] The implementation of these laws led to the relocation of approximately 3.5 million Black South Africans, and their descendants, from rural and urban areas into homelands, reserves and townships; the decay of traditional communal tenure regimes; the entrenchment of a 'double-standard system' of land rights under which white South Africans enjoyed strong civil law land rights and

[1] Act 27 of 1913. The Act precluded black South Africans purchasing, hiring or otherwise acquiring land outside of 'scheduled native areas' - effectively native reserves.
[2] Act 38 of 1927. The Act precluded black South Africans owning land in scheduled native areas. It further granted authority over land administration in these native reserves to government-appointed tribal authorities. These tribal authorities allocated land rights to individuals in the form of permission to occupy certificates. The Act was recently repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment (7 of 2008), which commenced on 30 December 2010.
[3] Act 18 of 1936. The Act enabled the Government to eliminate black-owned land situated outside of scheduled native areas. It furthermore provided for the establishment of the South African Development Trust which was empowered to acquire land for inclusion in native reserves. This land was effectively held in trust by the Government, but the administration of it was delegated to tribal authorities.
[4] Act 41 of 1950 and Act 36 of 1966. These Acts provided for the designation of different residential areas for different races and the forced removal of people into these areas.
[5] Act 52 of 1951. The Act empowered the Government to remove black South African's residing on public and privately-owned land and to establish resettlement camps to house these people.
[6] Act 68 of 1951. The Act provided for the establishment of black homelands and regional authorities to administer these homelands.
[7] Act 19 of 1954. The Act provided for the removal of Black South Africans residing in and around Johannesburg (principally those living in Soweto and Sophiatown).

Black South African's weak permit-based rights of occupation; and the creation of a chaotic matrix of institutions responsible for land administration.[8]

Following South Africa's transition to a constitutional democracy, the Government recognised that a key mechanism for facilitating both political and socio-economic transformation was land reform.[9] In an effort to reverse the historic disenfranchisement, disentitlement and resultant poverty caused by the apartheid land regime, the Government initiated a comprehensive land reform programme in the 1990s.

Finding its origins in the African National Congress's *Reconstruction and Development Programme: A Policy Framework*,[10] and informed by the property clause enshrined in the Constitution, South Africa's land reform programme is comprehensively encapsulated in the *White Paper on South African Land Policy*.[11] Published in 1997, the *White Paper* recognised that 'current landownership and land development patterns strongly reflect political and economic conditions of the apartheid era' and that 'racially-based land policies were a cause of insecurity, landlessness and poverty among black people'.[12] It identified the following aspects as requiring urgent attention: 'injustices of

[8] Hall R "Reconciling the Past, Present, and Future - The Parameters and Practices of Land Restitution in South Africa" in Walker C, Bohlin A, Hall R & Kepe T *Land, Memory, Reconstruction and Justice - Perspectives on Land Claims in South Africa* (2010) Ohio University Press Ohio 18-21; Mostert H "Land Restitution, Social Justice and Development" (2002) 119 *South African Law Journal* 401-402. See further: Claassens A & Cousins B "Communal Land Tenure from Above and Below. Land Rights, Authority and Livelihoods in Southern Africa" in Evers S, Spierenburg M & Wels H (eds) *Competing Jurisdictions - Settling Land Claims in Africa* (2005) Martinus Nijhoff Publishers Netherlands 31-34; Cousins B & Claassens A "Communal Land Rights, Democracy and Traditional Leaders in Post-Post-Apartheid South Africa" in Saruchera M (ed) *Securing Land and Resources in Africa: Pan-African Perspectives* (2004) PLAAS Bellville 140-144; and Department of Land Affairs *White Paper on South African Land Policy* (1997) 11.

[9] Mostert H (2002) *South African Law Journal* 402 & 419.

[10] African National Congress *Reconstruction and Development Programme: A Policy Framework (1994).* This *Policy Framework* recognised '(l)and is the most basic need for rural dwellers. Apartheid policies pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships' and that a 'national land reform programme is the central and driving force of a programme for rural development. Such a programme aims to redress effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers' (19-20). It furthermore called for the implementation of a fundamental land reform programme, which ensures 'security of tenure for all South Africans, regardless of their system of land holding' (ibid).

[11] Department of Land Affairs *White Paper on South African Land Policy* (1997).

[12] *White Paper on South African Land Policy* (1997) *v*.

racially-based land dispossession; inequitable distribution of land ownership; and the need for security of tenure for all'.[13]

Inherent in the above are the three main components of South Africa's land reform programme, namely: land restitution; land redistribution; and land tenure reform. The land restitution component of the programme seeks to 'restore land and provide other restitutionary remedies to people dispossessed by racially discriminatory legislation'.[14] The land redistribution component aims to provide the 'landless poor, labour tenants, farm workers, women and emergent farmers' with 'access to land for residential and productive uses, in order to improve their income and quality of life.'[15] The land tenure component seeks to bring all people occupying land in South Africa 'under a unitary, legally validated system of landholding'.[16] The first and third components of the land reform programme are of key relevance to the domestic implementation of communally-conserved areas (CCAs).

Of the 79 696 claims lodged under the restitution component of the land reform programme, only 121 relate to land situated within protected areas.[17] Of these, 78 validated claims in protected areas remained unsettled.[18] While the overall number of claims is small, the area of land subject to such claims is extensive.[19] The forms of

[13] Ibid.
[14] *White Paper on South African Land Policy* (1997) 52-60.
[15] *White Paper on South African Land Policy* (1997) 38-51. The main vehicle for facilitating redistribution is the provision of settlement/land acquisition grants and support.
[16] *White Paper on South African Land Policy* (1997) 60-75.
[17] Commission on Restitution of Land Rights *Presentation by Chief Land Claims Commissioner (Mr Mphela) at People and Parks Congress*, dated August 2008. See further: Department of Environmental Affairs *Conservation for the People with the People: A Review of the People and Parks Programme* (2010) 37; Department of Environmental Affairs *Status of Land Claims in Protected* Areas (2010) Unpublished document, dated February 2010; De Koning M "Co-management and its Options in Protected Areas of South Africa" (2009) 39(2) *Africanus* 6; De Koning M & Marais M "Land Restitution and Settlement Options in Protected Areas in South Africa" (2009) 39(1) *Africanus* 67; and Kepe T "Land Claims and Comanagement of Protected Areas: Exploring the Challenges" (2008) 41 *Environmental Management* 311.
[18] Commission on Restitution of Land Rights *Presentation of Annual Report (2008/2009)* by Chief Land Claims Commissioner (Mr Mphela) to Portfolio Committee on Land Affairs, dated 8 July 2009. See further: *Conservation for the People with the People* (2010) 37; and *Status of Land Claims in Protected Areas* (2010).
[19] The extent of outstanding claims in the Kruger National Park alone, amount to 1 429 575 hectares (*Status of Land Claims in Protected* Areas (2010)). This is equal to three-quarters of the Park's total territory of 2 000 000 hectares.

protected areas in respect of which these claims have been lodged are diverse and include national parks,[20] nature reserves,[21] wilderness areas[22] and world heritage sites.[23]

Interestingly, it would appear that the proponents of the land reform programme did not anticipate restitution claims within protected areas as no mention is made of the potential conflict between conservation and land reform imperatives in the *White Paper.* Similarly, the Restitution of Land Rights Act,[24] which provides the statutory framework for implementing the restitution component of the *Land Reform Programme*, contains no distinct mechanisms for dealing with such claims. The Restitution of Land Rights Act is nonetheless of key relevance to the current enquiry. Prior to the reform of South Africa's contemporary conservation regime in 2005, the Act provided the main regime through which 43 communal land restitution claims within existing protected areas were

[20] Restitution claims have been lodged in the following national parks: Addo Elephant National Park; Augrabies National Park; Golden Gate Highlands National Park; Kgalagadi National Park; Kruger National Park; Mapungubwe National Park; Richtersveld National Park; Tsitsikama National Park; West Coast National Park; and Vaalbos National Park (list compiled from *Status of Land Claims in Protected* Areas (2010).

[21] Restitution claims have been lodged in the following nature reserves: Andover Nature Reserve; Andries Vosloo Kudu Reserve; Barberton Nature Reserve; Baviaanskloof Nature Reserve; Bellevue Nature Reserve; Bewaarskloof Nature Reserve; Blouberg Nature Reserve; Blyde River Canyon Nature Reserve; Borakalalo Nature Reserve; Commando Drift Nature Reserve; Double Drift Nature Reserve; Dwesa and Cwebe Nature Reserve; East Coast Nature Reserve; East London Coast Nature Reserve; Groot Letaba Game Reserve; Happy Rest Nature Reserve; Hluhluwe Imfolozi Park; Hluleka Nature Reserve; Honnet Nature Reserve; Impendle Nature Reserve; Ithala Nature Reserve; Lapala Wilderness; Leamington Nature Reserve; Lekgalmeetse Nature Reserve; Luchaba Nature Reserve; Loskop Dam Nature Reserve; Mabusa Nature Reserve; Madikwe Nature Reserve; Manyeleti Nature Reserve; Maria Moroka Nature Reserve; Mdala Nature Reserve; Mfolozi Game Reserve; Mkambati Nature Reserve; Mkhombo Nature Reserve; Mkuzi Game Reserve; Moepel Nature Reserve; Mpenjathe Nature Reserve; Mpofu Nature Reserve; Mthethomusha Nature Reserve; Mussina Nature Reserve; Nababiep Nature Reserve; Nduli Nature Reserve; Ndumo Game Reserve; Nkomazi Wilderness; Nteseki Nature Reserve; Nwanedi Nature Reserve; Ongeluksnek Nature Reserve; Phinda Game Reserve; Pilansberg Nature Reserve; QwaQwa National Park (officially designated as a nature reserve); Rust De Winter Nature Reserve; Sam Knott Nature Reserve; Selati Game Reserve; Silaka Nature Reserve; Soada Forest Nature Reserve; Songimvelo Nature Reserve; SS Skosana Nature Reserve; Suikerbosrand Nature Reserve; Tembe Elephant Park; 'The Swamp' Nature Reserve; Tsolwana Nature Reserve; Ubombo Mountain Nature Reserve; Umbumbazi Nature Reserve; Vaalkop Nature Reserve; Vembe Nature Reserve; Vernon Crooks Nature Reserve; Witsand Nature Reserve; Witvinger Nature Reserve; and Wonderkop Nature Reserve (list compiled from *Status of Land Claims in Protected* Areas (2010)).

[22] Restitution Claims have been lodged in the Ntendeka Wilderness Area and Wolkberg Wilderness Area (list compiled from *Status of Land Claims in Protected* Areas (2010)).

[23] Restitution claims have been lodged in the Isimangaliso Wetland Park (*Status of Land Claims in Protected* Areas (2010)).

[24] Act 22 of 1994.

settled.[25] Following such reform, the Restitution of Land Rights Act remains of key relevance in resolving the estimated 78 outstanding claims,[26] but its provisions should be read and applied in conjunction with South Africa's contemporary conservation regime.

As has been highlighted above, the land redistribution component of the land reform programme is principally concerned with providing poor Black South Africans with access to land for residential and small-scale farming purposes. The main mechanisms for doing so were initially the designation of land for such purposes under the Provision of Land and Assistance Act[27] and the provision of small grants under the Settlement Land Acquisition Grant.[28] This grant scheme has been supplemented by several additional grant schemes, namely: the Land Redistribution for Agricultural Development Grant;[29] Settlement Planning Grant;[30] Grant for the Acquisition and Development of

[25] Restitution claims have been settled in the following protected areas: Addo Elephant National Park; Augrabies National Park; Bellevue Nature Reserve; Borakalalo Nature Reserve Dwesa and Cwebe Nature Reserve; Hluhluwe Imfolozi Park; Hluleka Nature Reserve; Isimangaliso Wetland Park; Ithala Nature Reserve; Kgalagadi National Park; Kruger National Park; Lekgalmeetse Nature Reserve; Madikwe Nature Reserve; Matshakatini Private Nature Reserve; Mdala Nature Reserve; Mfolozi Game Reserve; Mkambati Nature Reserve; Mkuzi Game Reserve; Moepel Nature Reserve; Ndumo Game Reserve; Phinda Game Reserve; Pilansberg Nature Reserve; Richtersveld National Park; Rust De Winter Nature Reserve; Silaka Nature Reserve; Tembe Elephant Park; Tsitsikama National Park; Ubombo Mountain Nature Reserve; Wonderkop Nature Reserve; Vaalbos National Park; West Coast National Park; Weenen Nature Reserve; and Witvinger Nature Reserve (list compiled from *Status of Land Claims in Protected* Areas (2010). See further: *Conservation for the People with the People* (2010) 37.

[26] The Department of Environmental Affairs estimate the number of outstanding land claims in protected areas to be 78 (*Conservation for the People with the People* (2010) 37).

[27] Act 126 of 1993. The Act provides for the designation and subdivision of land for the purpose of settlement, and the rendering of financial assistance to persons to acquire the land and secure tenure rights therein.

[28] The objective of the Settlement Land Acquisition Grant is to improve land tenure security and to extend property ownership and/or access to land to the historically disadvantaged and the poor. The Grant was capped at R16 000 per application. For more information on the nature of the grant and its eligibility criteria, see: Department of Land Affairs *Grants and Service Policy of the Department of Land Affairs* (2001) 8-12; and *White Paper on South African Land Policy* (1997) 43-45.

[29] The objective of the Land Redistribution for Agricultural Development Grant is to provide assistance to Black South Africans to cover the transaction costs associated with projects falling under the Integrated Land Redistribution and Agricultural Development Programme. For more information on the nature of the grant and its eligibility criteria, see: *Grants and Service Policy of the Department of Land Affairs* (2001) 8-12.

[30] The objective of the Settlement Planning Grant is to assist poor communities to plan for the acquisition, settlement on, use and development of land. It also aims to assist such communities to clarify and record their land rights where their occupation of land is insecure. For more information on the nature of the grant and its eligibility criteria, see: *Grants and Service Policy of the Department of Land Affairs* (2001) 13-15.

Land for Municipal Commonage;[31] and the Settlement Production and Land Acquisition Grant.[32] Predominantly focusing on facilitating the acquisition and development of land for agriculture, an activity generally precluded within protected areas, the broader programme, together with its three grant schemes, is of little relevance to CCAs and shall accordingly not be the subject of further discussion.[33]

In contrast, the third component of the land reform programme, namely land tenure reform, does warrant much consideration. Perhaps the most complex component of the land reform programme, it seeks to overcome the following challenges: 'how to upgrade the variety of colonial land tenure arrangements currently restricting the tenure security and investment opportunities of Black South Africa's; how to resolve the overlapping and competing tenure rights of people forcibly removed and resettled on land to which others had prior rights; and how to strengthen the beneficial aspects of communal tenure systems and at the same time bring about changes in practices which have resulted in the erosion of tenure rights and the degradation of nature resources'.[34]

The past twenty years has seen the proliferation of laws seeking to address these land tenure challenges. One could theoretically group these laws into two categories. The first category seeks to provide greater security of tenure to the previously disenfranchised and disentitled majority of Black South Africans. These laws include the Upgrading of Land Tenure Rights Act;[35] Provision of Land and Assistance Act;[36] Land

[31] The objective of the Commonage Grant is to assist municipal authorities to acquire land to extend or create a commonage and to provide infrastructure on such land for the benefit of poor and disadvantaged residents. For more information on the nature of the grant and its eligibility criteria, see *Grants and Service Policy of the Department of Land Affairs* (2001) 15-16.

[32] The objective of the Settlement Production and Land Acquisition Grant, introduced in 2008, is to extend secure property ownership and access to land for settlement by poor, landless and historically disadvantaged South Africans. The quantum of the Grant is currently set at R111 152 per household. For more information on the nature of the grant and its eligibility criteria, see: Benjamin M, Naidu B & Yabel M *Understanding Land Tenure Law: Commentary and Legislation* (2008) Juta & Co Ltd Cape Town 21-23.

[33] For a comprehensive discussion of the land redistribution programme see: Ntsebeza L & Hall R (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) HSRC Press Cape Town.

[34] *White Paper on South African Land Policy* (1997) *viii*.

[35] Act 112 of 1991. The Act provides for the upgrading of various forms of land tenure which were prevalent under South Africa's apartheid land legislation, including: leaseholds, deeds of grant, quitrents; and permissions to occupy (Chapter 1). It furthermore provides for the capacity of tribes to acquire and dispose of property (Chapter 3).

Administration Act,[37] Interim Protection of Informal Land Rights Act,[38] Land Reform (Labour Tenants) Act,[39] Extension of Security of Tenure Act[40] and the Transformation of Certain Rural Areas Act.[41] Whilst of key relevance to the broader realm of land reform, these laws and their associated policy documents are not of direct relevance to the domestic implementation of CCAs and accordingly fall outside the ambit of this enquiry.

The second category, which includes the Communal Property Associations Act[42] and the Communal Land Rights Act,[43] seeks to regulate communal land rights. These laws are of central relevance to the domestic implementation of CCAs in South Africa. The former prescribes procedures for establishing communal institutions to hold such rights. The latter, whilst having been declared unconstitutional by the Constitutional Court in 2010,[44] remains relevant in that it provides an important reference point against which to critique the Government's initial attempt to afford statutory recognition to communal land rights and to identify key components for inclusion in any future regime. Both Acts accordingly fall squarely within the ambit of this enquiry.

It is to an analysis of the relevant legal regimes for implementing the land restitution and land tenure components of the *Land Reform Programme* that the enquiry now turns.

[36] Act 126 of 1993. The Act provides for the designation of land for settlement purposes under the land reform programme, and the provision of financial assistance and support for people acquiring such land.
[37] Act 2 of 1995. The Act provides for the delegation of powers and the assignment of the administration of laws regarding land matters applicable in the homelands and to provincial authorities.
[38] Act 31 of 1996. The Act affords interim protection to people with informal rights to, and interest in, land pending the finalisation of long-term reform measures.
[39] Act 3 of 1996. The Act provides for the acquisition of land and rights in land by labour tenants and the security of tenure for these labour tenants.
[40] Act 62 of 1997. The Act prescribes an array of measures to facilitate the long-term security of land tenure. It specifically regulates the conditions on which certain people can occupy land, the circumstances in which their right of occupation can be terminated and the procedures for evicting them.
[41] Act 94 of 1998. The Act provides for the transfer of the administration of 'coloured reserves' declared under the Rural Areas Act (House of Representatives) (9 of 1987) to CPAs declared under the Communal Property Association Act (28 of 1996).
[42] Act 28 of 1996.
[43] Act 1 of 2004.
[44] *Tongoane v Minister for Agriculture and Land Affairs* 2010 (6) SA 214 CC.

2. LAND RESTITUTION LAWS

2.1 OVERVIEW OF THE REGIME

As acknowledged in the *White Paper on South African Land Policy*, 'forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa and no settlement of land issues can be reached without addressing such historical imbalance'.[45] The main law that enables the Government to rectify these imbalances through the restoration of land rights is the Restitution of Land Rights Act.[46] The Act governs the following main aspects of relevance to CCAs: who may lodge land restitution claims; the procedure for lodging and settling these claims; and the forms of restitution that can be granted. It further provides for the establishment, powers and function of two key land restitution institutions, the Commission on the Restitution of Land Rights (the CRLR) and the Land Claims Court (LCC). The former administers the land restitution process. It is headed up by the Chief Land Claims Commissioner who has appointed several regional land claims commissioners (regional commissioners) to assist in the administration of land restitution claims lodged in several of the provinces.[47] The LCC adjudicates disputes that arise during the land restitution process.[48]

The Restitution of Land Rights Act entitles a 'person',[49] their 'direct descendant',[50] and a 'community'[51] dispossessed of a 'right in land'[52] after 13 June 1913 as a result of past

[45] *White Paper on South African Land Policy* (1997) 29.
[46] For a basic discussion of the Act and its implementation see: Hall "Reconciling the Past, Present, and Future" in Walker et al *Land, Memory, Reconstruction and Justice* (2010) 21-40; Van der Merwe C "Restitution of Land Rights Act 22 of 1994" (1994) 36(5) *Annual Survey of South African Law* 303-308; and Jaichand V *The Restitution of Land Rights: A Workbook* (1997) Lex Patria Johannesburg.
[47] The composition, powers and functions of the CRLR, the Chief Land Claims Commissioner and the regional commissioners are prescribed in Chapter II of the Act.
[48] The composition, powers, functions and procedures governing the operation of the LCC are prescribed in Chapter III of the Act.
[49] 'Person' is defined to include 'a community or part thereof' (section 1).
[50] 'Direct descendant' of a person is defined to include 'the spouse or partner in a customary union of such a person whether or not such customary union has been registered' (section 1).
[51] 'Community' is defined as 'any group of persons who rights in land are derived from shared rules determining access to land held in common by such a group, and includes part of any such group' (section 1).
[52] 'Right in land' is defined as 'any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under

'racially discriminatory laws or practices',[53] to 'restitution of a right in land',[54] provided that no just and equitable compensation was received in respect of such dispossession[55] and that the claim was submitted not later than 31 December 1998.[56] Several of these 'qualification criteria' have been subject of judicial scrutiny and academic debate, namely: the difficulties of proving the existence of a 'community';[57] the potential inequities associated with compelling often disparate groups to join together under the label of a single community for the purpose of submitting a land restitution claim;[58] what amounts to being 'dispossessed' of a 'right in land' 'as a result of racially discriminatory laws or practices';[59] the choice of 13 June 1913 as the cut-off date for land restitution claims;[60] and the ambit of the Act, specifically whether it extends

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a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question' (section 1).

[53] 'Racially discriminatory laws' are defined to include 'laws made by any sphere of government and subordinate legislation' (section 1). 'Racially discriminatory practices' are defined as meaning 'racially discriminatory practices, acts or omissions, direct or indirect, by - (a) any department of state or administration in the national, provincial or local sphere of government; (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation' (section 1).

[54] 'Restitution of a right in land' is defined as including '(a) the restoration of a right in land; or (b) equitable redress' (section 1). 'Restoration of a right in land' is in turn defined as the 'return of a right in land or a portion of land'; and 'equitable redress' as 'any equitable redress, other than the restoration of a right in land ... including (a) the granting of an appropriate right in alternative state-owned land; (b) the payment of compensation' (section 1).

[55] Section 2(1) and section 2(2).

[56] Section 2(1)(e).

[57] Recent cases to have considered what constitutes a 'community' include: *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC), and *Richtersveld Community v Alexkor Ltd* 2003 (6) BCLR 583 (SCA). For a discussion of these cases see: Mostert H "Change Through Jurisprudence - The Role of the Courts in Broadening the Scope of Restitution" in Walker et al *Land, Memory, Reconstruction and Justice* (2010) 64-68; Du Plessis W, Olivier N & Pienaar J "Land Matters: 2007(2)" (2007) 22 *SA Public Law* 551-553; and Mostert H & Fitzpatrick P "Living in the Margins of History on the Edge of the Country: Legal Foundation and the Richtersveld Community's Title to Land (Part 1)" (2004) 37(2) *Tydskrif vir die Suid-Afrikaanse Reg* 309-322. For a general discussion on this requirement see: Pienaar G "The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa" (2008) 2 *Stellenbosch Law Review* 263-264 & 269-273; Pienaar G "The Meaning of the Concept of Community in South African Land Tenure Legislation" (2005) 1 *Stellenbosch Law Revie*w 60-76; Van Der Walt A *Constitutional Property Law* (2005) Juta & Co Ltd Cape Town 291; and Mostert (2002) *South African Law Journal* 406-407.

[58] Kepe T "The Problem of Defining 'Community': Challenges for the Land Reform Programme in rural South Africa" (1999) 16(3) *Development Southern Africa* 415-433.

[59] The most recent case to consider these requirements was *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC). For a discussion of this cases see: Du Plessis et al (2007) *SA Public Law* 551-556. See generally on these requirements: Mostert "Change Through Jurisprudence" in Walker et al *Land, Memory, Reconstruction and Justice* (2010) 71-76; Van Der Walt *Constitutional Property Law* (2005) 291-293 & 295-297; and Mostert (2002) *South African Law Journal* 407-410.

[60] The cut-off date of 13 June 1913 coincides with the commencement of the Native Land Act (27 of

to include claims of aboriginal title.[61] Given that the 78 outstanding restitution claims in protected areas have been validated, in other words they are deemed by the CRLR to satisfy the Act's substantive qualification criteria prescribed in section 2(1), the above debates do not warrant further attention.

The second main aspect regulated by the Restitution of Land Rights Act, is the procedure for lodging and settling claims.[62] This procedure generally comprises of six main phases, namely: lodgement and registration; validation; gazetting; negotiation;

1913) which is regarded as heralding 'the formal adoption of territorial segregation as the leading principle of post-Union land Policy' (*White Paper on South African Land Policy* (1997) 54). While it is acknowledged that dispossession did take place in the colonial era preceding 1913, the Government did not deem it appropriate and reasonable for these injustices to be dealt with under the Restitution of Land Rights Act (*White Paper on South African Land Policy* (1997) 54). For a historical overview of dispossession which occurred prior to 1913 see: Cousins "More than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy" (2007) 7(3) *Journal of Agrarian Change* 296-300; Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 140-142; Mostert (2002) *South African Law Journal* 407-408; and Bennett T "African Land - A History of Dispossession" in Zimmermann R & Visser D (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) Oxford University Press 65-78.

[61] According to the *White Paper on South African Land Policy* (2007), the nature and scope of South Africa's restitution regime does not recognise the doctrine of aboriginal title owing to its potential for it to 'create a number of problems and legal-political complexities that would be impossible to unravel' (55). However, the debate about aboriginal title was triggered in a series of cases relating to a claim by the Richtersveld Community in the Northern Cape. See: *Richtersveld Community v Alexkor Ltd* 2003 (6) BCLR 583 (SCA) and *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC). For a comprehensive discussion of these cases and doctrine of aboriginal title see: Pienaar G "From Delgamuukw to Richtersveld - Are Land Claims in Canadian and South African Law Comparable?" (2005) 3 *Stellenbosch Law Review* 446-465; Bennett T & Powell C "Restoring Land: The Claims of Aboriginal Title, Customary Law and the Right to Culture" (2005) 3 *Stellenbosch Law Review* 431-445; Brink S "Legal Pluralism in South Africa in View of the Richtersveld Case" (2005) 2 *Stellenbosch Law Review* 175-193; Barry M "Now Another Thing Must Happen: Richtersveld and the Dilemmas of Land Reform in Post-Apartheid South Africa" (2004) 20(3) *South African Journal on Human Rights* 355-382; Mostert et al (2004) *Tydskrif vir die Suid-Afrikaanse Reg* 498-510; Van Wyk A "The Rocky Road to Restitution for the Richtersvelders" (2004) 67(3) *Tydskrif vir die Suid-Afrikaanse Reg* 479-489; Du Plessis W, Olivier N & Pienaar J "Expropriation, Restitution and Land Redistribution: An Answer to Land Problems in South Africa?" (2003) 18 *SA Public Law* 496-498; Mostert H "The Case of the Richtersveld Community: Promoting Reconciliation of Effecting Division" (2002) 65 (1) *Tydskrif vir die Suid-Afrikaanse Reg* 160-167; and Hoq L "Land Restitution and the Doctrine of Aboriginal Title" (2002) 18(3) *South African Journal on Human Rights* 421-443.

[62] The purpose of the following discussion is not to comprehensively detail the entire restitution process as this has been well documented in recent literature. It is rather to focus on those aspects of relevance to CCAs - particularly communal claims over land situated in protected areas. For a comprehensive discussion of the operation of the restitution process see: Van Der Walt *Constitutional Property Law* (2005) 291-293 & 298-305; Mostert (2002) *South African Law Journal* 412-418; Carey-Miller D & Pope A *Land Title in South Africa* (2000) Juta & Co Ltd Cape Town 240-341. For a comprehensive description of how the restitution process plays out in the context of land claims in protected areas see: De Koning et al (2009) *Africanus* 69-75.

settlement; and the implementation of the settlement. An applicant initiates the land restitution process by lodging a claim in the prescribed manner with the CRLR.[63] Where the claim is lodged on behalf of a community, the application must be accompanied by an appropriate resolution or document authorising the representative to submit the claim on behalf of the community.[64] Perhaps in anticipation of problems associated the submission of communal land claims, the Act affords the regional commissioner discretion to allow such documents to be submitted at a later stage[65] and prescribes a procedure for resolving disputes about who legitimately represents a community.[66] Furthermore, no doubt in anticipation of the complexity and sensitivity of such claims, the Act empowers the regional commissioner to give priority to communal land claims.[67]

Once the claim has been lodged, the regional commissioner must investigate the application to ensure that: it has been lodged in the prescribed manner; the claim satisfies the qualification criteria prescribed in section 2; and that the claim is not frivolous and vexatious.[68] While not statutorily prescribed, an interim land claims committee is usually formed at this stage to present the interests of the land claimants.[69] Following this validation process, the regional commissioner can either dismiss the claim, or deem it to be a valid claim. In the latter scenario, he/she must register the claim[70] and publish a notice in the *Government Gazette* containing the general details of the claim.[71] He/she must thereafter notify the owner of the land and any other party that may have an interest in the claim.[72] While relevant government departments and institutions could fall within the ambit of these 'other parties', no express provision is

[63] Section 10(1). The claim form is contained in Annexure A of the *Rules Regarding Procedure of the Commission* (GNR 703 *GG* No.16407 dated 12 May 1995).
[64] Section 10(3).
[65] Section 10(3).
[66] Section 10(4).
[67] Section 6(2)(d).
[68] Section 11(1). Additional aspects which require investigation are prescribed in Regulation 5 of the *Rules Regarding Procedure of the Commission* (1995). The regional commissioner is afforded broad powers of investigation under the Act (section 12).
[69] De Koning et al (2009) *Africanus* 70.
[70] Regulation 7 of the *Rules Regarding Procedure of the Commission* (1995).
[71] Section 11. The details to be included in the notice are: the title deed description of the land; the name by which the land is commonly known; particulars of the claimant; and an invitation to any person to comment on the claim within a prescribed period (Regulation 13 of the *Rules Regarding Procedure of the Commission* (1995)).
[72] Section 11(6).

made in the Act for mandatory consultation with such authorities throughout the restitution process. This is particularly pertinent in the context of land claims with environmental ramifications, such as communal claims within protected areas, where the exclusion or too late inclusion of relevant national, provincial and local environmental authorities[73] in the restitution process has led to confusion, skewed expectation and delay.[74]

The land claims process then enters the facilitation stage during which the regional commissioner, together with the land claimants, explores options for settling the land claim. The Act enables the Minister of Rural Development and Land Reform, or his delegate, to enter into an agreement with the claimants providing for one or more of the following:[75] the award to the claimant of land, a portion of land or any other right in land; the payment of compensation to the claimant; both an award of land and compensation; the manner in which the rights so awarded are to be held or the compensation so paid; and any other terms and conditions that the Minister deems appropriate.[76] Importantly, where the claimant is a community, the agreement must provide for all members of the community to have fair and equitable access to the land or compensation, and must ensure accountability on the part of the community's representative who holds the land or compensation on their behalf.[77] If at any stage during the course of the facilitation process, it becomes evident to the regional commissioner that there are two or more competing claims in respect of the same land, there are competing groups within a claimant community which is making the claim difficult to resolve, or there is any other

[73] These authorities may include: Department of Environmental Affairs; Department of Water Affairs; Department of Agriculture, Forestry and Fisheries; South African National Parks; South African National Botanical Institute; provincial conservation departments and authorities; and local conservation authorities.
[74] Du Plessis A "Land Restitution through the Lens of Environmental Law: Some Comments on the South African Vista" (2006) 1 *Potchefstroom Electronic Law Journal* 29; Wynberg R & Sowman M "Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension" (2007) 50(6) *Journal of Environmental Planning and Management* 785-793.
[75] The Minister is empowered to delegate this function to the Director General of Land Affairs or to a regional land claims commissioners (section 42D(3)-(5)).
[76] Section 42D(1).
[77] Section 42D(2).

issue that may be usefully resolved by way of mediation or negotiation, he/she can direct the parties to attempt to resolve their dispute by way of mediation or negotiation.[78]

The restitution process then moves to the settlement stage, where the Act provides for three separate processes.[79] If a settlement agreement has been concluded and the regional commissioner is satisfied with it, he/she can certify same in writing, following which the agreement becomes effective.[80] If a settlement agreement has been concluded and the regional commissioner is not satisfied with it, he/she may refer the matter to the LCC for determination.[81] If no settlement agreement has been concluded, the regional commissioner can similarly refer the matter to the LCC for determination. Where the matter is referred to the LCC, such referral must be accompanied by: a concise summary regarding the background of the claim; information necessary to enable the LCC to establish its jurisdiction; the reasons for the referral; and the regional commissioner's recommendations on how the matter should be resolved.[82] Land claimants can in certain circumstances approach the LCC directly for restitution of land rights.[83] In the case of a direct referral to the LCC, the regional commissioner previously administering the claim can suspend his/her investigation.[84] The LCC can at any stage order the regional commissioner to transfer any land claims to it for determination.[85] It can furthermore order an applicant to publish a notice in the *Government Gazette*

[78] Section 13.
[79] Prior to the Land Restitution and Reform Laws Amendment Act (18 of 1999) all settlement agreements had to be confirmed by the LCC. The Amendment Act sought to 'decongest' the LCC and speed up the restitution process by providing for three different options for finalizing/ratifying settlement agreements.
[80] Section 14(3).
[81] Section 14(3A). The regional commissioner can refer the agreement to the LCC for consideration where: a question of law arising from the agreement needs to be resolved; there is doubt whether all interested parties are subject to the agreement; there is doubt about the agreement's validity; there is doubt about the feasibility of implementing the agreement; in the case of a community claim, the agreement does not operate fairly and equitably between all members; the agreement does not comply with the provisions of the Act; the agreement is vague and contradictory; the parties agree that it is desirable for the court to consider the agreement; and any other good reason.
[82] Section 14(4).
[83] Section 38B. This was enabled following the insertion of Chapter IIIA in terms of the Land Restitution and Reform Laws Amendment Act (63 of 1997).
[84] Section 38B(3).
[85] Section 38B(4).

inviting other potential claimants to join the proceedings where it is of the opinion that not all relevant claimants are before it.[86]

The composition of the LCC and the rules governing its process are comprehensively detailed in the Restitution of Land Rights Act.[87] These do not justify repeating in their entirety here. Three aspects are, however, interesting to note in the context of the outstanding communal land restitution claims in protected areas. First, the LCC has the power to appoint assessors[88] to assist it in its deliberations and refer any matter which requires 'extensive examination of documents or scientific, technical or local investigation which cannot be conveniently conducted by the court' to an independent referee for investigation and advice.[89] Given the flexible qualification criteria for these assessors and referees, it provides a potential yet unutilised avenue for involving conservation experts in the resolution of the remaining land restitution claims in protected areas, where these come before the court for resolution. Secondly, environmental considerations are not expressly included in the array of factors to be taken into account by the LCC in resolving matters brought before it.[90] The inclusion of such considerations could ensure a more balanced enquiry on the part of the LCC when called upon to settle the outstanding land restitution claims in protected areas. Thirdly, the Act affords the judiciary discretion to blend formal court process with alternative dispute resolution procedures in seeking to resolve complex claims. The LCC can at any stage during its proceedings order the parties before it to attempt to settle an issue through a process of mediation and negotiation.[91] These less formal procedures may well provide a useful avenue for the LCC to resolve the outstanding restitution claims within protected areas given the nature and number of parties involved.

[86] Section 38D.
[87] The composition, powers and procedures of the LCC are detailed in Chapter III.
[88] Section 27.
[89] Section 28C.
[90] Factors to be taken into account are listed in section 33 of the Act. For further discussion of these factors see: Du Plessis (2006) *Potchefstroom Electronic Law Journal* 21.
[91] Section 35A. In the event of such an order, the main proceedings are stayed pending the outcome of such a process.

When called upon to settle a land restitution claim, the LCC has broad discretion to order: the restoration of land, a portion of land or any right in land in full or partial settlement of the claim; the Government to grant to claimant an appropriate right in alternative government-owned land; the Government to pay the claimant compensation; the Government to include the claimant as a beneficiary under an appropriate government housing or rural development programme; and to grant the claimant alternative relief.[92] The Court is further empowered to issue an array of ancillary orders including: determining conditions that must be fulfilled before a right in land can be restored; directing how its orders are to be carried out, including the prescription of time limits for implementing its orders; and where the claimant is a community, determining the manner in which the rights and/or compensation are to be held.[93] The purpose of the last of these ancillary orders is to ensure that all members of the dispossessed community have fair and equitable access to the land or compensation in question.[94] Furthermore, the Court even has the power to adjust the nature of property rights previously held by the claimant and to determine the form of title under which the right may be held in the future.[95]

The CRLR and the LCC accordingly have broad discretion regarding the procedures they adopt to settle claims, and the forms of redress they negotiate or order. The LCC has confirmed that whilst the restoration of land is the starting point, the CRLR and the LCC have discretion and cannot be compelled to restore the land where it is not possible due to competing public interest considerations.[96] What is interesting to note about the land restitution claims settled to date within protected areas, is that despite this broad discretion, the majority appear to have been settled in a similar manner. This generally takes the form of the grant of full title back to the claimant community subject to the condition that: the community do not reside on the land; the community agree to

[92] Section 35(1).
[93] Section 35(2).
[94] Section 35(3).
[95] Section 35(4).
[96] Recent cases to have considered this issue include: *MM Phela v Haakdoornbult Boerdery CC* 2008 (4) SA 488 (CC); and *Concerned Land Claimants' Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association* 2007 (2) SA 531 (CC). For further discussion of these cases see: Du Plessis W, Olivier N & Pienaar J "Land Matters: 2008(2)" (2008) 23 *SA Public Law* 106-108; and Du Plessis et al W, Olivier N & Pienaar J "Land Matters: 2007(1)" (2007) 22 *SA Public Law* 277.

conserve the land in perpetuity, and the community lease the land back to the conservation agency for a defined period of time. This trend is considered in detail in Chapter 9 (Part 4) and does not accordingly bare full discussion here. At this stage it is simply questioned whether the election to grant full title back to the communities on each and every occasion has not led to skewed expectations on the part of these communities. It is furthermore questioned why the authorities have not availed themselves of the full suite of restitution options at their disposal to tailor unique land tenure solutions to suit the specificities of each claimant community and protected area.

The final stage of the land restitution process involves the implementation of the settlement agreement. As frequently acknowledged by the Government, it is this stage where significant cracks appear in the restitution process.[97] With the exception of rules governing review and appeal, [98] and those affording discretion to the Minister of Rural Development and Land Reform to provide financial aid to successful claimants,[99] the Restitution of Land Rights Act is largely silent on: which authorities are responsible for the post-settlement process; how they should coordinate their efforts; what should be done by these authorities to facilitate the implementation of restitution settlements and orders; and who should fund these endeavours. As a result, the Department of Rural Development and Land Reform (DRD&LR) and the CRLR have historically withdrawn from the post-settlement process leaving the claimant communities floundering in a virtual vacuum.[100] This uncertainty has historically been compounded by a lack of post-settlement support and resources.[101] While successful claimant communities feasibly

[97] See the following Government reports and documents which refer to the need for improved post-settlement support: Commission on Restitution of Land Rights *Presentation of Annual Report (2008/2009)* by Chief Land Claims Commissioner (Mr Mphela) to the Select Committee on Land and Environmental Affairs, dated 11 August 2009; Commission on Restitution of Land Rights *Presentation of Annual Report (2008/2009)* by Chief Land Claims Commissioner (Mr Mphela) to the Portfolio Committee on Land Affairs, dated 8 July 2009; Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 22 & 28; Sustainable Development Consortium *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa: A Synthesis Report* (2007) Commission on Restitution of Land Rights 55-125 & 158-164; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 28 & 43; and Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 27, 32, 37 & 42-43.
[98] Section 36 and section 37.
[99] Section 42C.
[100] See: Du Plessis (2006) *Potchefstroom Electronic Law Journal* 28-30; and Du Plessis W, Olivier N & Pienaar J "Land Matters: 2006(2)" (2006) 21 *SA Public Law* 417.
[101] This has recently been acknowledged in various Government documents, including: Commission on

had access to the Restitution Discretionary Grant[102] and the Settlement Land Acquisition Grant,[103] the trivial quantum of these grants and the timing of their allocation rendered them largely ineffective in the context of communal land claims in protected areas.[104] Although the array and quantum of potential post-settlement government grants has increased, their scope has simultaneously been generally narrowed to small-scale agriculture.[105] The problem has not gone unnoticed and the former Department of Land Affairs commissioned the development of a *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa*[106] (*SIS Strategy*) in 2006. Formally launched by the Minister of Land Affairs and Agriculture in 2008, the mission underlying the *SIS Strategy* is the 'delivery of effective settlement and implementation support which contributes to successful land and agrarian reform to reduce poverty, enhances livelihood security, boosts economic growth, enables security of tenure and sustainable land use'.[107] The relevance of the *SIS Strategy* to CCAs is discussed in Chapter 6 (Part 4.2) below.

Restitution of Land Rights *Presentation of Annual Report (2008/2009)* (11 August 2009); Commission on Restitution of Land Rights *Presentation of Annual Report (2008/2009)* (8 July 2009); The Presidency: Republic of South Africa *Towards a Fifteen Year Review* (2008) 29*;* Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 22 & 28; and Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 28 & 43. For a comprehensive discussion on the problems associated with post-implementation support, see: *Settlement and Implementation Support Strategy* (2007) 55-125 & 158-164.

[102] The objective of the Restitution Discretionary Grant is to assist beneficiaries of negotiated restitution settlement agreements and to manage, secure or relocate to their restored/compensatory land. The quantum of the Grant is limited to R3000 per qualifying person. For more information on the nature of the Grant and its eligibility criteria, see: Department of Land Affairs *Grants and Service Policy of the Department of Land Affairs* (2001) 17-18.

[103] See note 28 above.

[104] See: Du Plessis (2006) *Potchefstroom Electronic Law Journal* 34.

[105] See: Chapter 6 (Part 1).

[106] Sustainable Development Consortium *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa: Synthesis Report* (2007) Commission on Restitution of Land Rights Pretoria. The *SIS Strategy* will be implemented as part of the *Land and Agrarian Reform Programme,* which is spearheaded by the Department of Agriculture and the Department of Rural Development and Land Reform. These Departments are currently working on an implementation plan for the *SIS Strategy* that seeks to place the mandate for post-settlement support in the hands of provincial and local government (Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 11). Whilst lofty in its aims, evidence of its implementation is difficult to source. See further Du Plessis et al (2007) *SA Public Law* 549.

[107] *Settlement and Implementation Support Strategy* (2007) 222.

2.2 PRACTICAL CHALLENGES FACING THE REGIME

With the initial[108] and subsequent revised deadline[109] for settling all land restitution claims having passed, approximately 96 % of the 79 696 claims lodged under the Restitution of Land Rights Act have been finalised.[110] On the face of it, this would appear commendable. However, if one dissects these statistics, most notably the nature and extent of the claims settled to date, they are less commendable. This is especially evident in the slow settlement of rural claims, which from a geographical and fiscal perspective, as opposed to a purely numerical perspective, comprise the bulk of restitution claims.

As at 31 March 2010, all 3852 outstanding restitution claims were situated in rural areas.[111] The estimated hectarage associated with these outstanding rural claims is in the region of 17 208 871,[112] a telling statistic if one considers that the total hectarage of all claims settled as at 31 March 2010 amounted to just 2 624 641.[113] An estimated R65.3 billion is required to settle these outstanding rural claims, similarly telling considering that it is threefold the amount spent on settling all claims to date.[114] The track record of the CRLR in settling restitution claims within protected areas is similarly problematic. At last count, only a third of the 121 restitution claims in protected areas have been settled in the past fifteen years.[115] It is also interesting to note that an

[108] The initial deadline set by the CRLR for settling all land restitution claims was 31 December 2005.
[109] The deadline for settling all land restitution claims was extended by President Mbeki in his State of the Nation Address (2005) to 31 March 2008 (Mbeki T "2005 State of the Nation Address" (available at http://www.info.gov.za/speeches/2005/05021110501001.htm)).
[110] Commission on Restitution of Land Rights *Presentation at People and Parks Congress* (2008). See further: De Koning (2009) *Africanus* 6; De Koning et al (2009) 67; and Kepe (2008) *Environmental Management* 311.
[111] Commission on Restitution of Land Rights *Presentation of Annual Report (2009-2010)* by Acting Chief Land Claims Commissioner (Mr Gamede) to the Portfolio Committee on Land Affairs, dated 14 October 2010.
[112] *Settlement and Implementation Support Strategy* (2007) 17.
[113] Commission on Restitution of Land Rights *Presentation of Annual Report (2009-2010)* (14 October 2010).
[114] An estimated R21.65 billion has been spent on settling claims in the period 1995 to 31 March 2010 (Commission on Restitution of Land Rights *Presentation of Annual Report (2009-2010)* (14 October 2010)).
[115] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009). Interestingly, no mention is made of such claims in the Commission on Restitution of Land Rights *Presentation of Annual Report (2009-2010)* (14 October 2010).

estimated R20 billion, almost equal to the entire budget spent on settling all claims to date, is required to settle just the outstanding claims in the Kruger National Park.[116]

Many reasons have been identified as contributing to the delay in the settlement of rural claims.[117] These can be divided into five main groups for the purpose of analysis. The first group relates to the nature of the claimants and includes: problems associated with locating claimants;[118] community in-fighting and inter-tribal disputes;[119] the lack of understanding, capacity and impatience on the part of claimant communities;[120] and the lack of cooperation of communities and local traditional leaders in providing adequate information to the restitution authorities.[121] The second group relates to the nature of the claims and includes: overlapping and counter claims in respect of the same land;[122] rural claimants predominantly wanting restoration of land as opposed to equitable redress;[123] the high cost of purchasing land in rural areas;[124] and the prevalence of fraudulent claims.[125] The third group relates to issues of process such as: the overly

[116] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009).
[117] These reasons are distilled from the past four *Annual Reports* of the CRLR. Interestingly, these reasons were similarly highlighted by several commentators in the early years of the land restitution process. See for example: Howard G "Righting the Wrongs of the Past: A Review of the Land Restitution Programme" (1999) 7(3) *Butterworths Property Law Digest* 15-20; and Marchant T "The Commission on the Restitution of Land Rights" (2001) 5(3) *Butterworths Property Law Digest* 15-20. See further: Pienaar G "Aspects of Land Administration in the Context of Good Governance" (2009) 12(2) *Potchefstroom Electronic Law Journal* 20-22.
[118] See: Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 28; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 17, 38 & 43; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 42.
[119] Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 22 & 38; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 3, 22, 34, 38 & 43; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 19.
[120] Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 17, 22, 28 & 43; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 32 & 37.
[121] Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 42-43; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 19.
[122] See: Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 32; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 37.
[123] Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 8.
[124] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009; Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 10 & 22; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 3, 17 & 43; Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 3 & 37; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 8, 23 & 58.
[125] Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 58.

bureaucratic and cumbersome restitution process;[126] the unregistered and unsurveyed nature of land in rural areas;[127] the challenge of simultaneously seeking to upgrade security of tenure and implement communal tenure regimes in rural areas;[128] and the pro-longed nature of negotiations owing to the high sentimental value attached to rural land.[129] The fourth relates to issues of capacity and resources namely: confusion regarding the mandate of relevant national, provincial and municipal authorities in the restitution process;[130] the lack of capacity and high turnover of staff within the CRLR;[131] and the lack of resources and infrastructure to fund the research and negotiation stages of the restitution process.[132] The final group of reasons relates to the overlapping and often competing interests of third parties and includes: the uncooperative attitude of existing landowners whose land is subject to restitution claims;[133] internal factionalism between communal property associations and local traditional authorities;[134] local traditional leaders seeking to use the land restitution process to resolve personal, chieftaincy and border disputes;[135] and unscrupulous third parties seeking to take

[126] Turner S & Ibsen H *Land and Agrarian Reform in South Arica: A Status Report* (2000) Research Report No.6, PLAAS Bellville 11. See further: Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009); and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 23.

[127] Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 3.

[128] Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 21.

[129] Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 38; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 3, 17 & 43; Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 42-43; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 8 & 37.

[130] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009); Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 32; and De Villiers B *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) Occasional Paper Series, KAS Johannesburg 59

[131] Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 28; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 38; and Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 21 & 42-42.

[132] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009); and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 42.

[133] Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 38; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 17, 34, 38 & 43; Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 27 & 32; and Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 42 & 58.

[134] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009); Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 22; and Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 17.

[135] Commission on Restitution of Land Rights *Annual Report 2007/2008* (2008) 10 & 30; Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 17 & 31; and Commission on Restitution of Land Rights *Annual Report 2005/2006* (2006) 21.

advantage of successful claimant communities during post-settlement commercial transactions.[136]

Several amendments to the Restitution of Land Rights Act have sought to remedy some of these challenges.[137] However, most of the above practical challenges remain. Given that the majority of South Africa's protected areas are situated in rural environs, these challenges impact on the resolution of the remaining restitution claims within protected areas. These challenges have been further confounded by the announcement of Cabinet in January 2009, that equitable redress, and not restoration, is the only option for settling the remaining 14 restitution claims in the Kruger National Park.[138] It is uncertain how 'contagious' this decision not to restore land rights will be in respect of the other outstanding claims in protected areas. It is furthermore uncertain to what extent this decision, which could be deemed by communities to constitute a 'second dispossession' of their land rights, will further undermine the faith of claimant communities in the restitution process.

The Government clearly faces many practical challenges in finalising the restitution component of the land reform programme. The manner in which these challenges have manifested in the settlement of restitution claims in several of South Africa's protected areas is considered in detail in Chapter 9 below. These challenges must be considered in the context of other relevant components of South Africa's land reform programme, most notably that of land tenure reform. As highlighted above, specific elements of the land tenure reform programme itself, and the intersection between the tenure reform and restitution components of the land reform programme, have been acknowledged as frustrating the finalisation of outstanding restitution claims. It is accordingly to a

[136] Commission on Restitution of Land Rights *Annual Report 2006/2007* (2007) 34.
[137] These include: provision for the CRLR to finalise settlement agreements without having to refer them to the LCC for approval (section 14(3) substituted by the Land Restitution and Reform Laws Amendment Act (18 of 1999); and provision for the Minister to acquire, purchase and expropriate land with or without a court order for any land reform purposes (section 42D amended by the Restitution of Land Rights Amendment Act (48 of 2003).
[138] Government Communication Information System "State Announces Decision on Kruger National Park Land Claims" Joint Statement issued by the Department of Environmental Affairs and Tourism and the Department of Land Affairs, dated 28 January 2009.

consideration of the tenure reform component of the land reform programme that the enquiry now turns.

3. LAND TENURE REFORM LAWS

The land tenure challenges that greeted those tasked with overseeing South Africa's transformation to a democracy are well documented in the *White Paper on South African Land Policy.*[139] First, how to reverse the regime which prevented ownership of land by Black South Africans? Secondly, how to secure and uplift the status of the various forms of land tenure which did exist in designated townships, native reserves and homelands, but which were largely 'subservient, permit-based or "held in trust"' by the Government?[140] Thirdly, how to transform the institutions responsible for administering these forms of tenure, which were historically controlled by government-appointed tribal authorities that frequently operated in a corrupt and undemocratic manner? Fourthly, how to provide recognition to previously ignored de facto and/or traditional communal tenure rights which were historically regarded of second class status and which the Government had sought to 'privatise and convert ... into individual ownership'?[141]

Many laws have been implemented during the past two decades to provide first, greater security of tenure to the previously disenfranchised and disentitled majority of Black South Africans;[142] and secondly, to afford greater recognition to communal land rights.[143] As has been highlighted above, while the former category of laws is of key relevance to the broader realm of land tenure reform, they are not of direct relevance to the domestic implementation of CCAs. They accordingly fall outside the ambit of this enquiry. In contrast, the latter category, comprising of the Communal Property

[139] *White Paper on South African Land Policy* (1997) 30-32.
[140] Ibid 30.
[141] Ibid 31.
[142] These laws include: Transformation of Certain Rural Areas Act (94 of 1998); Extension of Security of Tenure Act (62 of 1997); Interim Protection of Informal Land Rights Act (31 of 1996); Land Reform (Labour Tenants) Act (3 of 1996); Land Administration Act (2 of 1995); Provision of Certain Land for Settlement Act (126 of 1993); and Upgrading of Land Tenure Rights Act (112 of 1991).
[143] These laws include: Communal Land Rights Act (1 of 2004); and Communal Property Associations Act (28 of 1996).

Associations Act[144] and the Communal Land Rights Act,[145] are of key relevance. These laws are of central importance to the domestic implementation of CCAs in South Africa. The former prescribes procedures for establishing communal property associations which have frequently been the institutions to which land in protected areas has been restored under the Restitution of Land Rights Act. The latter, whilst having been declared unconstitutional by the Constitutional Court in 2010,[146] remains relevant as this law, and the extensive academic commentary on it, provides an important reference point for identifying key components for inclusion in any future communal property regime.

3.1 COMMUNAL PROPERTY ASSOCIATIONS ACT

The main object of the Communal Property Associations Act is to 'form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution'.[147] It is specifically acknowledged in the Act's Preamble that 'it is necessary to ensure that such institutions are established and managed in a manner which is non-discriminatory, equitable and democratic', and that such institutions are 'accountable to their members' and 'are protected against abuse' by members.

The Act applies to 'communities'[148] who either voluntarily, or are compelled by the LCC to, form a communal property association (CPA) to hold land rights, including those restored under the Restitution of Land Rights Act.[149] Provision is made in the Act for the establishment of provisional associations (effectively provisional CPAs) and CPAs. In respect of the former, the community must apply to the Director-General of the

[144] Act 28 of 1996.
[145] Act 1 of 2004.
[146] *Tongoane v Minister for Agriculture and Land Affairs* 2010 (6) SA 214 CC.
[147] Long Title of the Act.
[148] 'Community' is defined as 'a group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association as contemplated in section 2' (section 1).
[149] Section 2(1).

DRD&LR.[150] The application must contain: the intended name of provisional association; information demonstrating that the community is a 'community'; a clear indication of the land or right in land which may be acquired; a list of the names of the members of the provisional association, or where this is not feasible, a set of principles and procedures for identifying prospective members; a list of names of the interim committee democratically elected to represent the provisional association; information reasonably required by the Director-General relating to the right of the community to occupy, use and/or settle on the land; and finally a written undertaking by the interim committee that pending the adoption of the CPA's constitution, it will adhere to the principles prescribed in section 9 of the Act.[151] These principles, which must underpin the constitution of the resultant CPA, include: fair and inclusive decision-making; equality of membership; democratic process; fair access to the CPA's property; and accountability and transparency.[152] If satisfied, the Director-General can consent to the registration of the provisional association.[153] Once so registered, the provisional association constitutes a juristic person and is empowered to acquire a right to use or occupy land for twelve months during which time it is expected that the 'final' CPA will be registered.[154] The provisional association is not empowered to alienate its rights in any manner.[155]

The registration of a provisional association is not a necessary precondition for establishing a 'final' CPA. The key difference regarding the registration of a 'final' CPA relates to the drafting and adoption of a constitution by the community. Detailed provisions are prescribed in the Act regarding the content of the constitution [156] and the

[150] Section 5(1).
[151] Section 5(2).
[152] Section 9(1).
[153] The actual registration is undertaken by the Registration Officer, an officer within the DRD&LR, who registers the provisional association and allocates a registration number and certificate to it (section 9(3)). The procedures for registration and the information to be kept in the CPA Register are prescribed in Regulation 2 and 3 of the *Regulations in Terms of the Communal Property Association Act* (GNR 1908 *GG* No. 17620 dated 22 November 1996).
[154] Section 9(4)(a) and (c) and section 9(5). Provision is made to enable the Director-General to extend the duration of the initial 12 month period on good cause shown.
[155] Section 9(4)(b).
[156] The constitution must be consistent with the principles espoused in section 9 (section 8(2)(c)). It must furthermore address the broad array of the matters listed in Schedule 1 of the Act (section 8(2)(d)). These

process for drafting and adopting it.[157] These are largely intended to ensure that the content of the constitution, and the process leading up to its adoption, are based on the principles of fairness, equity, accountability and transparency. Where a dispute arises regarding the preparation or adoption of the constitution, provision is made for the Director-General on his own accord, or on request of the community, to appoint a conciliator to assist in resolving the dispute.[158] Once the community has adopted its constitution, it can apply to the Director-General to register the CPA. If the Director-General is satisfied that the community qualifies for registration,[159] he/she can consent to the registration.[160] In recognition of the fact that prior to the introduction of the Communal Property Associations Act 'similar entities'[161] had been formed to hold land rights restored to communities under the Restitution of Land Rights Act, the Act provides a fast-track procedure for effectively transforming these similar entities into CPAs.[162]

include: the name, address and objects of the CPA; the land to be owned by the CPA; membership criteria; a list of members or the principles and procedures for determining membership; classes of membership and rights of members; the rights of members to use the CPA's property; grounds for terminating membership; the committee responsible for administering the CPA (including how it is elected and run); the powers of the CPA; how the constitution can be altered; disciplinary matters; and the dissolution of the CPA.

[157] Provision is made for securing assistance from the DRD&LR and the discretionary submission of a draft constitution to the Director-General for comment (section 6). Prior to adopting its constitution, the community must notify the Director-General, convene a meeting to adopt the constitution, and invite an authorised officer from the DRD&LR to attend the meeting (section 7 read with Regulation 5 of the *Regulations in Terms of the Communal Property Association Act* (1996)). The authorised officer is required to prepare detailed minutes of the meeting for submission to the Director-General (section 7(2)).

[158] Section 10(2).

[159] An association qualifies for registration if: the provisions of the Act apply to it; the main objective of the association is to hold property; its constitution complies with the principles prescribed in section 9; the constitution addressed the matters set out in Schedule 1; the association have followed the prescribed procedures in adopting the constitution; and the resolution to adopt the constitution was supported by the majority of members of the community present or represented at the meeting convened to adopt it (section 8(2)).

[160] As with provisional associations, the actual registration is undertaken by the Registration Officer, an officer of the DRD&LR, who registers the CPA and allocates a registration number and certificate to it (section 8(3)).

[161] 'Similar entity' is defined as a 'trust, associations of persons or company registered in terms of section 21 of the Companies Act, 1973 (Act 61 of 1973)' (section 1).

[162] Where a community has previously established such a similar entity through a democratic process, the Director-General may, if such a community wishes to transform it into a CPA, exempt the community from having to strictly comply with the procedures set out in the Act for registering a CPA (section 2(5)).

Once registered, the CPA is a juristic person and can acquire rights and secure obligations in its own name.[163] It can furthermore, subject to its constitution, acquire, dispose and/or encumber immovable property or real rights therein.[164] The latter transactions must, however, be approved by the majority of CPA members.[165] The Director-General may assist any member seeking to challenge the validity of transactions undertaken without such approval.[166] No amendments can be made to the constitution of a CPA, unless the Director-General has consented thereto in writing.[167] Furthermore, the Director-General must be notified of any alterations to the membership of a provisional association and a CPA.[168]

The CPA is theoretically administered by a democratically elected committee, the members of which stand in a fiduciary duty to the broader membership of the CPA.[169] Any person who breaches this fiduciary duty, breaches a provision of the constitution, abuses any power or authority vested in him/her and/or incites or attempts to incite a person to do the above, is guilty of an offence.[170] Where disputes arise between a provisional association or CPA and its members, the Director-General has discretion to appoint a facilitator to assist in resolving the dispute.[171] The Act also provides for the submission of annual reports by the CPA to the Director-General containing a broad range of information.[172] The Director-General is in turn required to submit an annual report to the Minister of Rural Development and Land Reform on existing provisional

[163] Section 8(6).
[164] Ibid.
[165] Section 12(1).
[166] Section 12(4)-(6).
[167] Section 8(10). In addition, the CPA must generally comply with the procedures set out in section 6 and section 7 of the Act prior to affecting such an amendment (section 8(11)).
[168] Section 11(9) read with Regulation 11 of the *Regulations in Terms of the Communal Property Association Act* (1996).
[169] Section 8(7).
[170] Section 14.
[171] Section 10(2).
[172] Section 11 read with Regulation 8 and 9 of the *Regulations in Terms of the Communal Property Association Act* (1996). The array of information includes: the names and details of committee members and new CPA members; copies of the CPA's financial statements; and a list of all dealings in land and rights to land involving land held by the CPA.

associations and CPAs, and the extent to which the objects of the Act are being achieved.[173]

Notwithstanding this relatively comprehensive regime providing for the establishment of institutions to hold communal land rights restored to communities under the Restitution of Land Rights Act, the practical operation of the approximately 952 CPAs and similar entities (namely approximately 700 trusts) has been far from successful.[174] Specific concerns highlighted by commentators as contributing to their failure include: the 'too sophisticated' and cumbersome procedures governing the establishment and operation of CPAs; the fact that communal customs and practices are frequently not taken into account by those tasked with assisting communities in drafting their constitutions; the attempt to compel often fragmented and multi-layered community structures to form a single CPA; and the failure of the Government to provide adequate support during the pre- and post-establishment phase.[175] In its *Review of Communal Property Institutions*[176] undertaken in 2005, the Centre for Scientific and Industrial Research concluded that:

> '...the majority of CPIs are partly functional from an institutional perspective but are largely or totally dysfunctional in terms of allocation of individual resources and the defining of clear usage rights, responsibilities, powers and procedures for members and the decision making body. Transparency and accountability is also often below what is required.'

[173] Section 17.
[174] *Settlement and Implementation Support Strategy* (2007) 160-162; and De Villiers *A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 70-71.
[175] See: Pienaar (2009) 12(2) *Potchefstroom Electronic Law Journal* 23-24; Pienaar G "The Land Titling Debate in South Africa" (2006) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 435; Pienaar (2005) *Stellenbosch Law Review* 65; Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 145; De Villiers A *Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 70-71; Cousins B "Reforming Communal Land Tenure in South Africa - Why the draft Communal Land Rights Bill is not the Answer" (2002) 3(3) *ESR Review* 8; and Pienaar G "Communal Property Arrangements: A Second Bite" in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform into the 21st Century* (2000) PLAAS/NLC Bellville/Braamfontein 322-323 & 325-330.
[176] Council for Industrial and Scientific Research *Review of Communal Property Institutions* (2005) CSIR, Pretoria, quoted in Lahiff E "'Capitalist Collectivism'? How Inappropriate Models of Common Property are Hampering South Africa's Land Reform" Unpublished paper presented at the International Association for the Studies of the Commons 12th Biennial Conference, University of Gloucestershire, Cheltenham, July 2008, 7.

Several additional and interrelated problems relating to the formation and operation of CPAs, and the role of the Government in supporting and monitoring their operation, are highlighted in the *SIS Strategy*.[177] Regarding their formation, there is a tendency to unduly expedite the establishment process due to budgetary constraints. As a result, the procedures for establishing CPAs are frequently 'reduced to steps in the project cycle that enable the transfer of land' as opposed to a process for 'claimants and participants to clarify their rights and obligations and put in place effective institutions to manage these'.[178] Regarding their operation, CPA committees frequently fail to govern the institution in accordance with the substantive rules and procedures prescribed in their founding documents.[179] This is on occasion due to capacity constraints and in other contexts due to wilful default.[180] Regarding post-establishment support, the Government lacks capacity to monitor the extent to which CPAs are fulfilling their functions or complying with their reporting obligations.[181] This is no doubt compounded by the fact that the Government has apparently lost its initial register of the first 450 CPAs, is yet to establish an electronic register for CPAs, and has failed to record any 'similar entities' (such as trusts) to which land rights have been restored under the Restitution of Land Rights Act.[182] It is accordingly not surprising that many CPAs are characterised by 'self-help, elite capture, uncontrolled use of the resources and internal conflict'.[183] This is a somewhat damning and concerning assessment of the institutions principally tasked with holding communal land rights restored in terms of the land restitution regime; institutions, which as has been mentioned above, are supposed to be founded on democratic principles such as fairness, equity, accountability and transparency. The manner in which these problems have manifest in the settled land claims in protected areas is considered in Chapter 9 (Part 7) below.

[177] *Settlement and Implementation Support Strategy* (2007) 94 & 160-162.
[178] *Settlement and Implementation Support Strategy* (2007) 160-161.
[179] *Settlement and Implementation Support Strategy* (2007) 161-162.
[180] Ibid.
[181] *Settlement and Implementation Support Strategy* (2007) 24.
[182] Ibid.
[183] *Settlement and Implementation Support Strategy* (2007) 160.

3.2 COMMUNAL LAND RIGHTS ACT

The Communal Land Rights Act, promulgated some six years ago,[184] was to provide for the recognition and regulation of communal land rights regime in South Africa. Prior to it coming into force, the Constitutional Court held in *Tongoane v Minister for Agriculture and Land Affairs*[185] that the entire Act was unconstitutional and invalid for 'want of compliance' with the procedures set out in the Constitution for enacting legislation.[186] Nonetheless, a brief discussion of its provisions is relevant in that it highlights the anticipated approach of the Government to recognise, upgrade and administer communal land rights in South Africa.[187]

The ambit of the Communal Land Rights Act was to have been far broader than its counterpart, the Communal Property Associations Act. As highlighted above, the latter provides for the establishment of institutions to hold rights restored to communities under the Restitution of Land Rights Act.[188] As will be illustrated below, the former sought to upgrade and secure the previous forms of subservient and permit-based communal tenure prevalent in South Africa. It further sought to reform the frequently undemocratic institutions responsible for administering land held under such forms of tenure.

[184] The Act was assented to on 14 July 2004.
[185] 2010 (6) SA 214 CC.
[186] Ngcobo CJ deemed the Act to be one that substantially affects the interests of the Provinces (para. 97). Owing to Government's non-compliance with section 76 of the Constitution, which compels a Bill to be referred to the National Council of Provinces for consideration and approval, the entire Act was held to be unconstitutional (para. 112). The Constitutional Court did not accordingly deem it necessary to confirm the decision of the court a quo in the *Tongoane v Minister for Agriculture and Land Affairs* (Unreported judgment of Ledwaba J in the High Court (North Gauteng Division) under Case No. 11678/2006, dated 30 October 2009) which declared sections 21 and 22 of the Act to be unconstitutional on substantive grounds (para. 116). These sections provide for the establishment and composition of the land administration committees, the anticipated principal institutions for administering communal land in rural areas. See further on the Constitutional Court judgment: Khunou F "Judgment Takes Out the Heart of CLARA on Procedural Grounds: the Constitutional Court approach in Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10" (2010) 503 *De Rebus* 26-29.
[187] For an overview of the Act, see: Smith H "An Overview of the Communal Land Rights Act 11 of 2004" in Claassens A & Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) University of Cape Town Press Cape Town 35-71. For a comprehensive critique of the substantive content of the Act and the procedures leading to its promulgation, see generally: Claassens et al *Land, Power and Custom* (2008).
[188] See further Chapter 6 (Part 3.1).

The Communal Land Rights Act would have applied to 'communal land' which the law defined to include: state land held under 'beneficial occupation';[189] state land in respect of which several forms of subservient and permit-based tenure were granted to Black communities under apartheid land legislation;[190] land held by the KwaZulu-Natal Ingonyama Trust;[191] and land acquired by communities in terms of South Africa's restitution and redistribution programme.[192]

The Act specifically recognised the institution of a community,[193] defined as 'a group of persons whose rights to land are derived from shared rules determining access to land held in common by such a group'.[194] In order to be so recognised, a community would have had to make, adopt and register, with the Director-General of the DRD&LR, a set of community rules to regulate the administration and use of communal land by the community.[195] Once the community rules had been duly registered, the community would have acquired juristic personality and would have been empowered to: acquire and hold rights and incur obligations; and own, encumber and dispose of movable and immovable property.[196] Each community would have been required to establish a land administration committee (LAC), which would have been the principal institution for representing the community in its land dealings.[197] The composition, tenure and procedures for electing members of a LAC were prescribed in the Act in an effort to

[189] 'Beneficial occupation' was defined as 'occupation of land by a person for a continuous period of not less than five years prior to 31 December 1997 as if that person was the owner, without force, openly and without the permission of the owner' (section 1).
[190] These laws include: Self-Governing Territories Constitution Act (21 of 1971); Development Trust and Land Act (18 of 1936); and the Black Land Administration Act (27 of 1913).
[191] The KwaZulu-Natal Ingonyama Trust Act (3 of 1994) effectively transferred the ownership and administration of some 2.8 million hectares of rural land in the KwaZulu-Natal Province to the KwaZulu-Natal Ingonyama Trust. The Trust was, and still is, responsible for administering this land for the material benefit and social wellbeing of the individual members of the communities residing on the land.
[192] Section 1 read with section 2.
[193] Section 3.
[194] Section 1.
[195] Section 19. The prescribed content and process for making and registering these community rules were contained in Chapter 3 of the *Draft Regulations under the Communal Land Rights Act* (GN 199 *GG* No. 30736 dated 6 February 2008).
[196] Section 3.
[197] Section 21 read with section 24. The procedures for establishing a LAC, its composition and powers and functions were prescribed in detail in Chapter 4 of the *Draft Regulations under the Communal Land Rights Act* (2008).

ensure that the interests of all government authorities and community members were safeguarded.[198] However, the above provisions were potentially circumvented as the Act provided that where the community had a recognised traditional council, the council could have performed the powers and functions of the LAC.[199] While an obligation was imposed on such traditional councils to ensure that their membership satisfied that prescribed for LACs when operating in the land administration domain,[200] several commentators were of the opinion that the nature of the traditional councils held potential for undermining the tenor of the Act to entrench a more democratic and equitable communal land administration regime.[201] Whilst not confirmed by the Constitutional Court, this was the reason for the High Court declaring section 21 and section 22 of the Communal Land Rights Act unconstitutional and invalid.[202]

A range of obligations would have been imposed on LACs, including the administration of communal land.[203] Importantly, any decision made by a LAC that would have had the 'effect of disposing of communal land or a right in communal land to any person, including a community member', would have had to be ratified in writing by a Land

[198] The members of a LAC would not have been able to hold any traditional leadership position (section 22(2)). At least one third of the total membership of a LAC would have had to be women and one member would have had to represent the interests of 'vulnerable community members, including women, children and the youth, the elderly and the disabled' (section 22(4)). Each of the following authorities would also have had discretion to designate one non-voting member of a LAC: Minister of Rural Development ad Land Affairs; Chairperson of relevant Land Rights Board; relevant provincial MEC for agriculture; relevant provincial MEC for land affairs; and every municipal authority in whose area the LAC functions (section 22(5)). The term of office of LAC members may not exceed 5 years (section 22(5).

[199] Section 21(2). These traditional councils are established and regulated in terms of the Traditional Leadership and Governance Framework Act (41 of 2003). For a discussion of these traditional councils, see: Chapter 6 (Part 5.3).

[200] Section 21(3) and (4).

[201] See generally: Claassens A "Customary Law and Zones of Chiefly Sovereignty: The Impact of Government Policy on Whose Voice Prevails in the Making and Changing of Customary Law" in Claassens et al *Land, Power and Custom* (2008) 371-377; Pienaar (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 454; Ntsebeza L *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2005) Brill Leiden; Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 139-158; Cousins (2004) *ESR Review* 8; Ntsebeza L "Democratic Decentralisation and Traditional Authority: Dilemmas of Land Administration in Rural South Africa" (2004) 16(1) *European Journal of Development Research* 71-89; Meer T & Campell C "Traditional Leadership in Democratic South Africa" (2007); and Ntsebeza L *Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa: Case Studies from the Eastern Cape* (1999) *Research Report* No.3, PLAAS Bellville.

[202] *Tongoane v The National Minister for Agriculture and Land Affairs* (2009).

[203] These included: the allocation of new order rights; the establishment and maintenance of registers of land transactions; the promotion and safeguarding of the interest of the community and its members in land; the resolution of disputes; and continual liaison with municipal authorities (section 24(3)).

Rights Board.[204] The Minister would have had the power to establish these Land Rights Boards.[205] In order to ensure that their membership would have had the requisite diversity, skills, independence and objectivity, the Act: prescribed their composition;[206] provided for the appointment of members by the Minister and not the community;[207] limited the tenure of membership;[208] and precluded the selection of political representatives in the national, provincial and local sphere of government as members.[209]

In an effort to upgrade and secure the various forms of communal tenure prevalent in South Africa, the Communal Land Rights Act would have entitled a community or person to 'tenure which is legally secure or to comparable redress' if their tenure of land 'is legally insecure as a result of past racially discriminatory laws or practices'.[210] To do so, the Act recognised both 'old order rights'[211] and 'new order rights'.[212] The former comprised of the subservient and permit-based forms of communal tenure that existed, and continue to exist, in many rural areas in South Africa. The latter constituted new forms of communal and individual tenure determined by the Minister. The procedure for upgrading and securing old order communal rights and that for validating new order

[204] Section 24(2).
[205] The Minister would have been able,, by notice in the *Government Gazette*, to establish one of more Land Rights Boards (section 25). Their additional functions would have included: providing impartial advice to the Minister and any community on matters concerning sustainable land ownership and use, the development of land and the provision of access to land on an equitable basis; liason with all sphere of government and other relevant institutions; and monitoring community compliance with the Act (section 28(1)). The procedures for establishing a Land Rights Board, its composition; code of conduct and powers and functions are prescribed in detail in Chapter 1 of the *Draft Regulations under the Communal Land Rights Act* (2008).
[206] Section 26(2). The membership of each Land Rights Board would have had to comprise of the following: representatives from relevant organs of state; two members nominated by the relevant Provincial House of Traditional Leaders; one member nominated by the commercial or industrial sector; seven members from the relevant community; and one member representing each of the following vulnerable groups - child-headed households, persons with disabilities, the youth and female-headed households.
[207] Section 26(1).
[208] Section 26(4). Membership was generally limited to five years.
[209] Section 27(1)(g).
[210] Section 4(1).
[211] 'Old order right' was defined as 'a tenure or other right in or to communal land which '- (a) is formal or informal; is registered or unregistered; derives from or is recognised by law, including customary law, practice or usage; and exists immediately prior to a determination by the Minister in terms of section 18...' (section 1).
[212] 'New order right' was defined as 'a tenure or other right in communal or other land which has been confirmed, converted or validated by the Minister in terms of section 18' (section 1).

rights was to be very similar.[213] Both would have generally involved the designation of a land rights enquirer,[214] the institution of a land rights enquiry[215] and the submission of a land rights enquiry report to the Minister.[216] Having considered the latter report prepared by the land rights enquirer, the Minister would have had to determine the 'location and extent of the land to be transferred to the community or person'.[217] The Minister would have also had to determine whether the land should: be registered in the name of one community; be subdivided and held by different persons; be partly held by the community with the remainder subdivided and held by different persons; or be reserved as State land.[218] In respect of an old order right, the Minister would have had to either: confirm the right; convert it into ownership or a comparable new order right (and determine the nature of such a right); or cancel it whereupon comparable redress would have been due.[219] The Minister would have been empowered, in consultation with the relevant municipal authority, to impose land-use and other conditions on any such determination.[220] Where any dispute arose following a land rights enquiry, the Minister would have been precluded from making any determination until the dispute had been

[213] See generally Chapter 5 of the Communal Land Rights Act. The procedures for appointing a land rights enquirer, instituting and conducting a land rights enquiry, preparing a land rights enquiry report and making a Ministerial determination are prescribed in detail in Chapter 2 of the *Draft Regulations under the Communal Land Rights Act* (2008).

[214] The Minister could have designated an officer from within the DRD&LR, or another suitable person, to conduct the land rights enquiry (section 15).

[215] The Minister would have been able to institute a land rights enquiry prior to securing an old order rights, transferring communal land to a community or person, or determining comparable redress (section 14(1)). A land rights enquiry would have had to traverse several issues including: the nature and extent of all rights, interests and tenure of land which were or could have been affected by the enquiry; the interests of the State; the options for legally securing insecure rights; provision for equitable access to the land; spatial planning and land-use management issues; and the need and options for comparable redress (section 14(2)). Provision was made for public notification of the holding of a land rights enquiry (section 16) and the manner in which the enquiry would have had to be held (section 17).

[216] On completion of the land rights enquiry, the enquirer would have had to prepare a report and publish it for public comment (section 17(3)(a) and (b)). The report and any comments received thereon would thereafter have had to be submitted to the Minister for consideration (section 17(3)(c)).

[217] Section 18(2).

[218] Section 18(3).

[219] Section 18(3)(d). The Minister had discretion, on application of a holder of an older order right which cannot be legally secured, to award the holder comparable redress (section 12(1)). Such redress could have taken the form of a grant of alternative land, monetary compensation, or a combination of both (section 12(2)).

[220] Section 18(4)(a).

resolved by 'mediation, other alternative traditional or non-traditional dispute resolution mechanisms or by a court'.[221]

Following a determination, the Minister would have had to register the old order or new order rights in the name of the community or person.[222] The Minister would have had to also take the necessary steps to transfer the land to the community or person.[223] Provision was made for the registration of subsequent transactions in respect of communal land[224] and the conversion of registered new order rights into freehold ownership.[225]

Having invalidated the Act, the Constitutional Court urged Parliament to enact revised communal land tenure legislation with 'a sense of urgency and diligence'.[226] The process of drafting such legislation is far from complete. Those tasked with it will no doubt take heed of the substantial constitutional problems inherent in the current version of the Act, particularly those relating to the establishment and composition of the institutions tasked with communal land administration in rural areas. They will hopefully also take heed of the extensive academic criticism that was levelled at draft versions of the Bill and the Act following its formal promulgation.[227]

The bulk of the criticism levelled against the Communal Land Rights Act related to the nature and form of the communal land rights which were to be recognised and created

[221] Section 18(5).
[222] Section 5(1). Where the determination related to communal land which was not State land, the ownership of such land would have vested in the community even where it was registered in the name of a person, traditional leader, community property association, trust or other entity (section 5(2)(a)). Such communal ownership would similarly have had to been endorsed on the title deed of the property by the Registrar of Deeds (section 5(2)(d)).
[223] Section 6. These steps would have included: having the land surveyed and a communal general plan prepared and approved in terms of the Land Survey Act (8 of 1997); having the plan registered in terms of the Deeds Registries Act (47 of 1937); and in respect of new order rights, transferring such rights to the appropriate recipients in terms of a Deed of Communal Land Right or other suitable deed.
[224] Section 8.
[225] Section 9.
[226] *Tongoane v Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC) para.127.
[227] For a summary of these challenges see: Cousins B "Contextualising the Controversies: Dilemmas of Communal Tenure in Post-Apartheid South Africa" in Claassens et al *Land, Power and Custom* (2008) 15-27; and Claassens A *Community Views on the Land Rights Act* (2008) Research Report No.15, PLAAS Bellville 33-37.

under it; and the form of the institutions established to hold such rights. In respect of the nature and form of communal land rights, key criticisms of the Act included the following: its failure to adequately recognise and secure the existing rights to occupation and use of land in communal areas;[228] the failure to define clearly the nature and content of the anticipated 'new order rights' provided for in the Act;[229] the broad discretionary powers afforded to the Minister to determine these rights;[230] and the Act's adoption of an inappropriate westernised approach to communal land tenure reform, one which sought to generally individualise communal land tenure through land titling,[231] as opposed to one which sought to build on the flexible, inclusive, layered and nested nature of communal land tenure regimes through affording statutory recognition to both group rights and the myriad forms of fragmented-use rights which are prevalent in rural areas of South Africa.[232]

In respect of the institutions which were to be created to hold such rights, key criticisms included the following: the possible overlap between the institutions created under the Communal Property Associations Act and those to be created under the Communal Land Rights Act;[233] the cumbersome and sophisticated procedures for establishing the LACs tasked with holding and administering communal land rights;[234] the potential for the prescribed content to be included in the rules regulating these institutions to clash

[228] Cousins B "'Embeddedness' Versus Titling: African Land Tenure Systems and the Potential Impacts of the Communal Land Rights Act 11 of 2004" (2005) 3 *Stellenbosch Law Review* 505-506.
[229] Cousins B (2004) *ESR Review* 8; and Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 149.
[230] Ibid.
[231] See generally on the problems associated with the implementation of this approach in South and Southern Africa: Sjaastad E & Cousins B "Formalisation of Land Rights in the South: An Overview" (2009) 26(1) *Land Use Policy* 1-9; and Cousins (2007) *Journal of Agrarian Change* 291.
[232] Pienaar (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 435; Claassens (2005) *Acta Juridica* 77-78; Claassens et al "Communal Land Tenure from Above and Below" in Evers et al *Competing Jurisdictions - Settling Land Claims in Africa* (2005) 48-51; Cousins (2004) *ESR Review* 7; Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 151; and Cousins (2002) *ESR Review* 8.
[233] Pienaar (2005) *Stellenbosch Law Review* 67; Cousins B "The Continuing Controversy Over the Communal Land Rights Bill of 2002" (2004) 5(4) *ESR Review* 8; and Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 149.
[234] Pienaar (2005) *Stellenbosch Law Review* 67; and Pienaar G "Security of Communal Land Tenure" 2004 *Journal of Contemporary Roman-Dutch Law* 250-251.

with indigenous laws, practices and customs;[235] the lack of clarity regarding the role of community members in the land rights enquiry process and any subsequent land transactions undertaken by LACs;[236] the potential lack of capacity and resources to enable these institutions to fulfil their statutory mandate;[237] the lack of post-implementation support and monitoring to assist them in doing so;[238] the inability of these institutions to sustain themselves in the commercial world given their inability to generate profit;[239] and the potential for the anticipated composition of these institutions to perpetuate the precarious status of rural women with regard to holding and administering land rights.[240]

Several commentators were accordingly of the view that the institutions to be created under the Act would be plagued by the myriad problems currently undermining the functioning of CPAs[241] and furthermore held potential for the Act to entrench the traditionally undemocratic and patriarchal traditional councils as the key institutions responsible for administering communal land tenure under the Act.[242] Concerns were also raised regarding the feasibility of implementing the Act given the capacity requirements and high costs associated with administering its anticipated cadastral

[235] Pienaar (2005) *Stellenbosch Law Review* 67.
[236] Claassens A "Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act" (2005) 42 *Acta Juridica* 75-77; Cousins (2004) *ESR Review* 8; Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 149; and Cousins B "Potential and Pitfalls of 'Communal' Land Tenure Reform: Experience in Africa and Implications for South Africa" Unpublished paper presented at World Bank Conference on Land Governance in Support of the MDGs: Responding to New Challenges, Washington DC March 2009, 14.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Several commentators are of the opinion that the specific provisions in the Act aimed at securing the existing land tenure rights of women, providing increased future access to land by women, and reserving a role for women in both the LAC and Land Rights Boards (see specifically sections 4(2), 5(1), 14(2)(g); 18(1)(e); 22(3); 26(2)(d)(iv)) were insufficient to secure the land rights of women and their role in land administration and management. See specifically: Claassens A & Mnisi S "Rural Women Redefining Land Rights in the Context of Living Customary Law" (2009) 25 *South African Journal on Human Rights* 491-516; Claassens A & Ngubane S "Women, Land and Power: The Impact of the Communal Land Rights Act" in Claassens et al *Land, Power and Custom* (2008) 154-183; Cousins (2005) *Stellenbosch Law Review* 507-508; Claassens (2005) *Acta Juridica* 42-81; and Cousins et al "Communal Land Rights, Democracy and Traditional Leaders" in Saruchera *Securing Land and Resources in Africa* (2004) 149.
[241] Pienaar (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 451 & 454; and Cousins (2002) *ESR Review* 8.
[242] Cousins (2005) *Stellenbosch Law Review* 508-510.

system;[243] and the potential for the Act's cadastral system to compound tribal boundary disputes and ethnic differences given its failure to properly account for the nested, overlapping and adaptive nature of communal land rights in rural areas.[244]

4. POLICIES, PLANS AND PROGRAMMES

As in the context of South Africa's conservation domain, the country's land authorities have introduced several programmes, project and strategies to facilitate the implementation of the land reform regime. These include in chronological order, the *Comprehensive Rural Development Programme (CRDP)*,[245] *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa (SIS Strategy)*,[246] *Land and Agrarian Reform Project (LARP)*[247] and the *Proactive Land Acquisition Strategy (PLAS).*[248] The *CRDP* and *SIS Strategy* are of direct relevance to

[243] These costs were estimated to be in the region of R500 million (Pienaar (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 452 & 453). It has furthermore been estimated that it would take some 200 years to transfer land to the estimated 20 000 rural communities in terms of the process set out in the Act (Cousins (2002) *ESR Review* 8-9). See generally on challenges facing the implementation of the Communal Land Rights Act: Olivier N "Communal Land Rights Act 11 of 2004: Overview, Institutional Arrangements and Implementation Guidelines" (2006) *Obiter* 304-315.

[244] Cousins B "Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries" Claassens et al *Land, Power and Custom* (2008) 109-137; Cousins "Potential and Pitfalls of 'Communal' Land Tenure Reform" (2009) 14 & 15; Cousins (2007) 7(3) *Journal of Agrarian Change* 291; Cousins B "No Way to Communal Land Rights: Boundary Disputes Will Stall the CLR Act" (2004) 16 *New Agenda* 18-24; and Cousins (2004) *ESR Review* 7.

[245] Ministry of Rural Development and Land Reform *The Comprehensive Rural Development Programme Framework* (2009).

[246] Sustainable Development Consortium *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa*: *A Synthesis Report* (2007) Commission on Restitution of Land Rights Pretoria.

[247] Government of the Republic of South Africa *The Land and Agrarian Reform Project: The Concept Document* (2008) (Version 5(2)), dated February 2008. The *LARP* seeks to create a new framework 'for delivery and collaboration on land reform and agricultural support to accelerate the rate and sustainability of transformation' in the agriculture sector. A joint initiate of the erstwhile Department of Land Affairs and Department of Agriculture, it specifically aims to: redistribute 5 million hectares of white-owned agricultural land to 10 000 new agricultural producers; increase Black entrepreneurs in the agribusiness industry by 10 %; provide universal access to agricultural support services to specific target groups including farm dwellers, communal farmers and new and/or existing Black agribusiness entrepreneurs; and increase agricultural production by these groups by 10-15 %. See further: Lahiff E *Land Reform in South Africa: A Status Report* (2008) Research Report No.38, PLAAS Bellville 27-31.

[248] Department of Land Affairs *Implementation Plan for the Proactive Land Acquisition Strategy* (2006) (Version 1), dated May 2006. Originating in 2003, the *PLAS* provides the policy framework for guiding the proactive acquisition of land by the Government for targeted groups in South Africa through the Provision of Land and Assistance Act. Complemented by a comprehensive *Implementation Plan for the Proactive*

the domestic implementation of CCAs and their content is accordingly considered in detail below. The *LARP* and *PLAS*, while relevant to the broad context of rural development and land reform, are not directly relevant to this enquiry owing to their focus on agriculture and not conservation. They do not accordingly warrant further consideration.

4.1 *COMPREHENSIVE RURAL DEVELOPMENT PROGRAMME*

The vision of the *CRDP*, introduced by the Ministry of Rural Development and Land Reform in 2009, is to create 'vibrant, equitable and sustainable rural communities'.[249] Building on the *Integrated Sustainable Rural Development Strategy*[250] published in 2000, the *CRDP* adopts a three-pronged approach focusing on coordinating and integrating broad-based agrarian transformation,[251] strategically increasing rural development,[252] and improving the land reform programme in rural areas.[253] The *CRDP* is principally implemented by the Department of Rural Development and Land Reform and is funded through R500m of the land reform budget allocated for rural development.

Land Acquisition Strategy published in 2006, the express purpose of the *PLAS* is to promote growth, employment and equity in land ownership in particularly the rural areas of South Africa by 2014.

[249] Ministry of Rural Development and Land Reform *The Comprehensive Rural Development Programme Framework* (2009) 3-4.

[250] The Presidency *Integrated Sustainable Rural Development Strategy* (2000).

[251] This prong of the *CRDP* focuses on: the 'establishment of rural business initiatives, agro-industries, co-operatives, cultural initiatives and vibrant local markets' in rural areas; and the revitalization of 'communication infrastructure, public amenities and facilities in villages and small rural towns' (*The Comprehensive Rural Development Programme Framework* (2009) 3-4). Objectives include: facilitating livestock farming, crop farming and related value chain processing; promoting the use of appropriate technologies; recognizing indigenous knowledge systems; promoting food security; strengthening rural livelihoods; and facilitating sustainable natural resource management (Ibid 4 & 13-14).

[252] This prong of the *CRDP* focuses on enabling rural communities to 'take control of their destiny' and deal with rural poverty through the 'optimal use and management of natural resources' (*The Comprehensive Rural Development Programme Framework* (2009) 4). Objectives include: facilitating social mobilisation within rural communities; establishing savings clubs and cooperatives to promote economic activities; undertaking leadership training and social facilitation to promote economic independence; promoting democratisation, coordination and cooperative governance within and between relevant institutions; and increasing the role of non-governmental and community based organisations (Ibid 4 & 14-15).

[253] This prong of the *CRDP* focuses on expediting the settlement of outstanding rural land restitution claims and developing 'less costly alternative models of land redistribution while reviewing legislation and policies that apply to both programmes' (*The Comprehensive Rural Development Programme Framework* (2009) 4). Objectives include: reviewing land reform products and processes; increasing the pace of land redistribution, land tenure reform and land restitution in rural areas; providing effective support to all land reform programmes (Ibid 5 & 16-20).

It is guided by a *National Action Plan* that prescribes an array of short, medium and long-term goals.[254] Initially piloted at two sites,[255] the ambit of the programme has been extended to other rural sites.[256] With the ambit of the *CRDP* extending to rural development generally, and not specifically to rural agriculture, it is of relevance to the current enquiry as it provides a feasible source of funding for promoting rural development through the vehicle of CCAs. This issue is explored in more detail in Chapter 9 (Part 10) below.

4.2 *SETTLEMENT AND IMPLEMENTATION SUPPORT STRATEGY FOR LAND AND AGRARIAN REFORM IN SOUTH AFRICA*

The *SIS Strategy*, commissioned by the erstwhile Department of Land Affairs, was formally launched in February 2008. It comprises of both an extensive analysis of the challenges associated with post-settlement support in relation to South Africa's Land Reform Programme, and a comprehensive series of recommendations regarding how to overcome them.

As is comprehensively canvassed in Chapter 9 below, many of the challenges identified in the *SIS Strategy* are prevalent in South Africa's CCAs. This is especially the case in those established by restoring land situated in existing protected areas to communal property institutions. Relevant challenges identified in the *SIS Strategy* as cross-cutting all components of the land reform programme include: uncertainty about which government authorities have the mandate for post-settlement support; poor intergovernmental relations between all spheres of government; inadequate post-settlement support planning; a lack of clarity regarding the nature of rights and benefits allocated to land reform beneficiaries; the failure of communal property institutions to promote open, accountable and equitable decision-making; capacity and resource constraints among all stakeholders; the absence of effective information management,

[254] *The Comprehensive Rural Development Programme Framework* (2009) 30-32.
[255] The two pilot sites were Riemvasmaak (Northern Cape) and Muyexe Village (Limpopo Province).
[256] For an overview of these other pilot sites see: Department of Rural Development and Land Reform, *Comprehensive Rural Development Programme* - Presentation to the Select Committee on Land and Environmental Affairs, dated 4 May 2010.

monitoring and evaluation; a lack of communication between all relevant stakeholders; and the land reform programme being driven by quantitative targets as opposed to qualitative results.[257]

These diverse challenges are complemented in the land restitution context, by the following additional problems: the complexity of the settlement process; the continued disagreement between authorities regarding who is responsible for post-settlement support; the absence of tangible benefits for the majority of claimant communities; the adoption of a 'one-size-fits-all' approach to resolving the majority of land claims; the high levels of social risk associated with compelling often disparate claimant communities to lodge their land claims under the 'rubric of a community claim'; the failure of the authorities to implement development plans and provide basic support; and the trend for strategic post-settlement partnerships with third parties to entrench previous inequalities.[258]

It is acknowledged in the *SIS Strategy* that '... without urgent and significant investment in settlement and implementation support services, existing post-settlement support capacity will be overwhelmed, which could place the entire land reform programme at risk.'[259] A range of mechanisms and institutional arrangements are accordingly proposed to overcome these challenges.[260] Those of direct relevance to CCAs include: adapting existing land reform policies and guidelines to include environmental planning; establishing institutional arrangements to enable ecosystem's approaches to integrated environmental management; ensuring land restitution claims in protected areas that result in co-management agreements are adequately supported by a dedicated intergovernmental task team; guaranteeing the transfer of meaningful benefits to claimant communities; developing a programme to inform claimant communities of their

[257] *Settlement and Implementation Support Strategy* (2007) 158-164.
[258] *Settlement and Implementation Support Strategy* (2007) 56-125.
[259] *Settlement and Implementation Support Strategy* (2007) *xv*.
[260] These mechanims aim to: achieve functional and spatial integration; secure rights, strengthen institutions and promote social development; build livelihood security, develop enterprises and provide technical support; and ensure sustainable human settlements and integrated natural resource management. For a discussion of these measures, see: *Settlement and Implementation Support Strategy* (2007) 34-55.

environmental rights, responsibilities and liabilities; developing protocols for mapping environmental opportunities and constraints in protected areas; and reviewing the extent to which natural resource management and resource tenure rules are clearly defined as part of the business planning and legal entity formation process.[261] The *SIS Strategy* recommends a complex array of institutional options for implementing these proposals at the national, provincial, district, local and ward level.[262] It furthermore provides guidance on how to roll out the *Strategy.*[263]

Whilst the evaluation of existing challenges facing post-settlement support and the proposals for overcoming these challenges are theoretically sound, one must question the ability of the relevant authorities to roll out the latter. Considering that the settlement of the remainder of the 4296 restitution claims are alone estimated to require an additional 65.3 billion budget to settle by 2014,[264] the potential to leverage sufficient additional resources to fund the post-settlement support proposals contained in the *SIS Strategy* must be questioned. These proposals, in so far as they relate to the domestic implementation of CCAs, are critically considered in Chapter 9 below.

5. KEY INSTITUTIONS

With the exception of a clear statutory framework for dealing with communal land tenure, South Africa has a comprehensive statutory and policy framework for implementing the three components of its land reform programme. Equally comprehensive, is the array of institutions tasked with doing so. These institutions span different national ministries and department structures, and traverse all three spheres of government. Added to the above is a diverse array of traditional authorities and new communal property institutions. This web of institutions, particularly those with a potential role to play in implementing and administering CCAs, is highlighted below.

[261] *Settlement and Implementation Support Strategy* (2007) 47-48.
[262] *Settlement and Implementation Support Strategy* (2007) 55-61.
[263] *Settlement and Implementation Support Strategy* (2007) 442-456.
[264] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009). See further Du Plessis W, Olivier N & Pienaar J "Land Affairs and Rural Development; Agriculture: 2009(2)" (2009) 24 *SA Public Law* 154.

5.1 MINISTRIES, DEPARTMENTS AND STATUTORY AUTHORITIES

Prior to the revision of South Africa's National Cabinet portfolios in early 2009, national oversight of South Africa's land reform regime fell to the Minister of Land Affairs and Agriculture.[265] Since May 2009, this mandate has been allocated to the Minister of Rural Development and Land Reform,[266] and the administration of all land reform legislation to the DRD&LR.[267] The DRD&LR is divided into various branches, several of which administer different components of relevance to the country's land reform programme. The Land and Tenure Reform Branch is responsible for administering the land redistribution and tenure reform components of the programme.[268] The Restitution Branch is responsible for administering the land restitution component of the programme, a function that is practically undertaken by the CRLR. The CRLR, which comprises of a Chief Land Claims Commissioner, Deputy Land Claims Commissioner and seven regional land claims commissioners, is directly accountable to the Restitution Branch of the DRD&LR. The powers and functions of the CRLR and its commissioners are prescribed in the Restitution of Land Rights Act.[269] So too are the powers of the LCC, tasked with adjudicating disputes which arise during the land restitution

[265] The administration of the land reform regime during this era was largely undertaken by the Department of Land Affairs, duly assisted in the Department of Agriculture where issues of land reform intersected with those of agriculture.

[266] See GN 44 *GG* No. 32367 dated 1 July 2009. Key land reform laws transferred to the Department of Rural Development and Land Reform include: Deed Registries Act (47 of 1937); Black Authorities Act (68 of 1951); Abolition of Racially Based Land Measures Act (108 of 1991); Upgrading of Land Tenure Rights Act (112 of 1991); Land Title Adjustment Act (111 of 1993); Provision of Land and Assistance Act (126 of 1993); KwaZulu-Natal Ingonyama Trust Act (3 of 1994); Restitution of Land Rights Act (22 of 1994); Land Administration Act (2 of 1995); Land Reform (Labour Tenants) Act (3 of 1996); Communal Property Associations Act (28 of 1996); Interim Protection of Informal Land Rights Act (31 of 1996); Extension of Security of Tenure Act (62 of 1997); Transformation of Certain Rural Areas Act (94 of 1998); and the Communal Land Rights Act (11 of 2004).

[267] For an overview of the structure of the DRD&LR, see: http://www.ruraldevelopment.gov.za/.

[268] This Branch is in turn divided into: the Chief Directorate of Land Reform Implementation Management and Coordination (whose function it is to provide general management support to provincial offices of the Department); and the Chief Directorate of Strategic Management and Technical Support Services (whose function it is to administer the land tenure reform and land redistribution components of the land reform programme).

[269] Chapter II of the Act read together with the *Rules Regarding the Procedure of the Commission* (1995). The composition, powers, functions and procedures governing the operation of the CRLR are discussed fully in Chapter 6 (Part 2.1).

process.[270] The Land Planning and Information Branch is responsible for deeds registration, cadastral surveys, mapping and spatial planning.[271]

Owing to the fact that land affairs falls within the exclusive competence of national government, one does not find ministries and departments expressly mandated to deal with land reform issues duplicated within provincial and local government structures. The DRD&LR has established Provincial and District Land Reform Offices in all nine provinces to facilitate the administration of the land tenure reform and redistribution process at the provincial and local level.[272]

However, land reform issues do not in reality fall under the exclusive purview of the DRD&LR and its associated institutions. Several additional national and provincial agencies are of relevance where land reform issues intersect with their conservation counterparts. These could include: the Department of Environmental Affairs, SANParks, provincial environmental departments and conservation agencies, municipal authorities, environmental departments and protected areas management authorities;[273] the National Treasury;[274] the Department of Agriculture, Fisheries and Forestry, Department of Mineral Resources and Department of Water Affairs;[275] the Department of Public Works;[276] and the Department of Cooperative Governance and Traditional Affairs.[277] Several additional national, provincial and local government authorities are frequently compelled to enter the fray during the land reform post-settlement implementation and

[270] Chapter III of the Act. The composition, powers, functions and procedures governing the operation of the LCC are similarly discussed fully in Chapter 6 (Part 2.1).
[271] This Branch is in turn divided into: the Chief Registrar of Deeds (who is responsible for overseeing deeds registration, legal support, deeds training and the functioning of the Deeds Offices); the Chief Directorate of Surveys and Mapping; and the Chief Directorate of Spatial Planning and Information.
[272] These provincial and district offices are directly accountable to the Chief Directorate of Land Reform Implementation Management and Coordination.
[273] Where, for example, a land restitution claim relates to land situated within a protected area.
[274] Where, for example, a land restitution claim triggers financial implications for the Government, such as the conclusion of a lease between a successful claimant community and the conservation authority.
[275] Where, for example, the land subject to land redistribution, restitution or tenure reform is also of relevance for agriculture, fishing, forestry, mining and fresh-water conservation.
[276] Where, for example, the land subject to land redistribution, restitution or tenure reform is owned by the Government.
[277] Where, for example, issue of cooperative governance of traditional affairs are triggered by the proposed establishment or management of a communally conserved area.

support phase owing to the limited assistance currently provided by the DRD&LR once the claim has been settled.[278]

5.2 COMMUNAL PROPERTY INSTITUTIONS

As has been highlighted above,[279] South Africa's land reform regime generally requires claimant communities to hold land restored to them in terms of the land restitution programme in a communal property institution. Initially comprising of land trusts[280] and associations not for gain,[281] they have since the promulgation of the Communal Property Associations Act predominantly taken the form of communal property associations. These communal property institutions, and their temporary forerunners such as 'provisional CPAs' and 'interim land claims committees', play a key role in the negotiation, settlement and implementation of successful restitution claims in protected areas. If the Communal Land Rights Act had come into force, the above communal property institutions would have been complemented by land rights boards and LACs.

5.3 INSTITUTIONS OF TRADITIONAL AUTHORITY

Finding their origins in South Africa's constitutional dispensation, an array of institutions of traditional authority relevant to the administration of land in rural areas have been

[278] This assistance could include: providing grants or small-scale financing; facilitating local economic development initiatives (including spatial development initiatives); installing infrastructure and services, and providing skills, resources, training and capacity building. At the national level relevant departments could include: Department of Economic Development; Department of Human Settlements; Department of Public Works; Department of Social Development; Department of Tourism; Department of Trade and Industry; and Department of Water Affairs. At the provincial level relevant departments could include those dealing with: economic development; education; finance; public works; rural development; roads; transport; social development; and tourism. At the local level relevant departments could include those dealing with: community development; development planning; urban management; economic development; housing; infrastructure; municipal services; and transportation.

[279] See: Chapter 6 (Part 2).

[280] Regulated under the Trust Property Control Act (57 of 1988). Such trusts are created by way of agreement, testament or court order. Once so established the Act regulates the identification, registration and administration of trust property (which is defined as property which is held in a trust and which is administered by a trustee/s).

[281] Regulated under the Companies Act (61 of 1973). The Companies Act is generally concerned with the regulation of commercial companies. It however also makes provision for 'associations not for gain' (otherwise known as section 21 companies). The Act regulates all aspects relating to formation, operation and dissolution of the above entities.

either reconstituted or newly established during the course of the past decade.[282] These include traditional councils and national, provincial and local houses of traditional authorities. Several of these institutions potentially have a role to play in the context of CCAs.

Traditional councils are largely a remnant of South Africa's apartheid regime under which government-sanctioned tribal authorities, recognised under the Black Authorities Act,[283] controlled the administration of land within many rural areas.[284] These tribal authorities have in many cases been transformed into traditional councils under the Traditional Leadership and Governance Framework Act (TL&GFA).[285] The TL&GFA expressly recognises traditional communities that are 'subject to a system of traditional leadership' and observe 'a system of customary law'.[286] It further provides for the establishment of traditional councils to 'administer the affairs of the traditional community in accordance with customs and tradition'.[287] Their composition, functions and relationship to local government structures are clearly detailed in the Act.[288] If one surveys the array of powers afforded to the traditional councils, it would appear that unlike the tribal authorities, their role is one of advice, support and coordination (within the community and between the community and local government), and not one of land administration.[289]

Interestingly, the TL&GFA introduces an element of democracy into the traditional councils. At least 40 % of their membership must comprise of democratically elected members of the traditional community.[290] Several critics view this percentage as

[282] For a historic overview of the role traditional authorities have played in land administration in South Africa, see: Delius P "Contested Terrain: Land Rights and Chiefly Power in Historical Perspective" in Claassens et al *Land, Power and Custom* (2008) 211-237.
[283] Act 68 of 1951.
[284] Ntsebeza (2004) *European Journal of Development Research* 72-76.
[285] Act 41 of 2003.
[286] Section 2.
[287] Section 4(1)(a).
[288] Sections 3-7.
[289] The functions afforded to traditional councils are set out in section 4.
[290] Section 3(2)(c).

insufficient in circumventing the autocracy, nepotism and corruption that plagued tribal authorities.[291]

A further concern relates to their ambivalent future role in the context of rural communal land administration. As highlighted previously, whilst the Communal Land Rights Act anticipated the establishment of democratically elected LACs as the future institutions responsible for managing communal land, it provided for the allocation of this function to existing traditional councils. The potential this held for an 'abuse of power and mismanagement' of communal land has been noted,[292] especially owing to the fact that under customary law, land tenure and administration is frequently 'nested or "layered" in character'.[293] Accordingly, centralising authority in a single and often undemocratic institution, such a traditional council, may cause substantial confusion and unduly prejudice 'smaller' traditional 'groupings' previously granted tenure under South Africa's suite of post constitutional land legislation. The decision in *Tongoane v Minister for Agriculture and Land Affairs*[294] in which the Constitutional Court held that the entire Act to be unconstitutional and invalid is therefore to be welcomed. It seems likely that traditional councils will be removed from the realm of communal land administration in the near future. However, they may nonetheless play an important advisory, supportive and co-ordinating role within the community in the context of establishing and managing CCAs. This latter coordination role is further facilitated by recent amendments to the TL&GFA.[295]

[291] Claassens (2005) *Acta Juridica* 70-71; Ntsebeza (2004) *European Journal of Development Research* 72; Ntsebeza *Land Tenure Reform, Traditional Authorities and Rural Local Government* (1999); and Meer et al "Traditional Leadership in Democratic South Africa" (2007) 4. See generally on the problems associated with the role of tribal authorities in the management of common natural resources: Ainslie A "When 'Community' is not Enough: Managing Common Property Natural Resources" (1999) 16(3) *Development Southern Africa* 386-392.
[292] Meer et al T "Traditional Leadership in Democratic South Africa" (2007) 6.
[293] Cousins B "Key Provisions of the Communal Land Rights Act are Declared Unconstitutional" (2009) *Another Countryside,* Weblog of the Institute for Poverty Land and Agrarian Studies (available at http://anothercountryside.wordpress.com), dated 10 November 2009.
[294] 2010 (6) SA 214 CC.
[295] Affected by the Traditional Leadership and Governance Framework Amendment Act (23 of 2009).

The TL&GFA provides for the recognition of an array of additional traditional leadership positions[296] and local, provincial and national houses traditional leaders.[297] The role and functions ascribed to these leaders and institutions are vaguely framed and include: performing the 'functions provided for in terms of customary law and customs of the traditional community concerned'; and undertaking any additional function or role specifically allocated to them by the Government through legislative and other measures.[298] Local houses of traditional leaders are expressly tasked with advising municipal authorities on: matters pertaining to customary law, customs and traditional communities; and the development of planning frameworks and by-laws that impact of traditional communities.[299] The national house of traditional leaders is tasked with a similar function at the national level.[300] Where disputes arise in the exercise of their functions, provision is made for the Commission on Traditional Leadership Disputes and Claims to resolve such disputes.[301]

As should be evident from the above, the vast array of traditional leaders and their houses of traditional leadership have effectively been relegated to an advisory function.[302] Nonetheless, in so far as any current or prospective CCA, or associated future legislation or planning, impacts on customary law, customs and traditional communities, these traditional leaders and institutions provide an important forum for consultation, and potentially the resolution of disputes between rival communities, including those relating to tribal boundary disputes.

[296] These include: kings; queens; principal traditional leaders; senior traditional leaders; headman; headwomen; and kingship and queenship councils (Chapter 2 and 3).
[297] Chapter 4. The Act effectively provides for the retrospective statutory recognition of the National House of Traditional Leaders established under the National House of Traditional Leaders Act (10 of 1997). It furthermore provides for the recognition of Provincial Houses of Traditional Authority established in subsequent years in several provinces (KwaZulu-Natal; Eastern Cape; North West Province, Limpopo, Mpumalanga and Free State) in terms of a plethora of provincial laws including: Traditional Leadership and Governance Act (Mpumalanga) 3 of 2005; Traditional Leadership and Governance Act (Eastern Cape) 4 of 2005; Traditional Leadership and Governance Act (Kwazulu-Natal) 5 of 2005; and Traditional Leadership and Institutions Act (Limpopo) 6 of 2005. See generally section 28 (transitional provisions) of the Act.
[298] Section 19 read with section 20.
[299] Section 17(3).
[300] Section 18(1).
[301] Chapter 6 of the Act provides for the establishment and functions of the Commission.
[302] Williams M "Legislating 'Tradition' in South Africa" (2009) 35(1) *Journal of Southern African Studies* 197.

6. CONCLUSION

Within this chapter I considered those elements of South Africa's land reform programme of relevance to CCAs, specifically those relating to land restitution and land tenure reform. I discussed how in the absence of South Africa's contemporary conservation regime, the land reform authorities were required to use the Restitution of Land Rights Act to fashion their own procedures and mechanisms for restoring communal land located within protected areas. I emphasised how these authorities largely imposed one form of governance to resolve all land claims in protected areas, rather than tailoring different land tenure and management options to suit the specificity of each. I furthermore highlighted the practical problems inherent in the existing land restitution regime that hold potential for complicating the resolution of the extensive outstanding restitution claims in respect of land situated in protected areas.

With regard to land tenure reform, I considered those laws of relevance to communal land tenure, specifically the Communal Property Associations Act and the Communal Land Rights Act. In respect of the former, I highlighted the problems inherent in its application which currently undermine, and will continue to undermine, the communal property institutions tasked with holding restored land situated within protected areas. In respect of the latter, I considered the extent to which its anticipated procedures, tenure options and institutions held potential for overcoming the historic problems associated with communal land administration. Acknowledging that the Communal Land Rights Act will not commence in its current form having been declared unconstitutional in 2009, I nonetheless deemed such an analysis of relevance to the current enquiry for two main reasons. Firstly, I argued that the current text of the Act provides some idea of the anticipated approach of the Government to recognise, upgrade and administer communal land rights. Secondly, I argued that the extensive domestic criticism which has been levelled against the Act provides valuable insights for those tasked with formulating South Africa's future communal land rights regime.

Having critically analysed the relevant statutory framework, I sought to highlight the policies and programmes which inform its implementation. I emphasised that while the majority of these policies and programmes are tied to rural development and agricultural reform, several of them are of potential relevance to facilitating and supporting CCAs. I concluded the chapter by discussing the diverse array of institutions tasked with administering the components of South Africa's land reform regime. I stressed the potential role of each in the context of CCAs.

What should be evident from the above analysis is that South Africa's land reform regime has been, and remains, of critical relevance to the domestic implementation of CCAs. What should also be evident is that the land reform regime has for the bulk of the past two decades been operating in isolation from its conservation counterpart. Several recent Government initiatives have sought to traverse this artificial divide. It is towards an analysis of these initiatives that I now turn.

CHAPTER 7

LINKING SOUTH AFRICA'S CONSERVATION AND LAND REFORM REGIMES

1. INTRODUCTION

South Africa's legal and institutional framework of relevance to the introduction of communally-conserved areas (CCAs) is clearly very complex. This legal and institutional framework traverses two main domains, namely conservation and land reform, which have historically operated in isolation from one another. The challenges associated with the above are compounded by the fact that these domains are themselves each beset by legal and institutional fragmentation.[1] The origins of this fragmentation clearly lie in the negotiated political compromise that shaped the constitutional allocation of legislative and executive competences between the national, provincial and local spheres of government.[2]

Calls have emanated from particularly the environmental quarter for authorities to adhere to the dictates of cooperative governance enshrined in Chapter 3 of the Constitution of the Republic of South Africa.[3] These calls continue to resound within the conservation sector.[4] However, notwithstanding the existence of an array of statutory

[1] Department of Environmental Affairs *Status of Land Claims in Protected* Areas (2010) Unpublished document, dated February 2010.
[2] For a discussion of the allocation of these constitutional competences, see: Chapter 4 (Part 4).
[3] Constitution of the Republic of South Africa, 1996. See most recently: Paterson A "Seeking to Undermine Cooperative Governance and Land-Use Planning" (2010) 25(2) *SA Public Law* 1-7; Muller K "Environmental Governance in South Africa" in Strydom H & King N (eds) *Environmental Management in South Africa* (2nd Ed) (2009) Juta & Co Ltd Cape Town 68-96; Kotze L "Environmental Governance Perspective on Compliance and Enforcement in South Africa" in Paterson A & Kotze L (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) Juta & Co Ltd Cape Town103-125; and Du Plessis W "Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures" (2008) 23 *SA Public Law* 87-110.
[4] Paterson A "Wandering About South Africa's New Protected Areas Regime" (2007) (1) *SA Public Law* 6-7.

mechanisms,[5] non-statutory initiatives[6] and policy documents[7] for the past decade, it is only in the past four years that the Government has taken tangible steps to permeate the apparent barrier between the conservation and land reform domains. The first part of this chapter seeks to reflect critically on these initiatives. As will be highlighted in this

[5] Statutory mechanisms expressly aimed at facilitating cooperative governance are numerous. A full discussion falls outside the purview of this dissertation. In summary, they are principally enshrined in the Intergovernmental Relations Framework Act (13 of 2005) and the National Environmental Management Act (107 of 1998). The former Act, which is administered by the Department of Cooperative Governance and Traditional Affairs, provides for: the establishment of an array of intergovernmental structures such as the President's Co-ordinating Council and national, provincial and municipal intergovernmental forums (Chapter 2); the prescription of protocols for conducting intergovernmental relations (Chapter 3); and procedures for the settlement of intergovernmental disputes (Chapter 4). The latter Act, which is administered by the DEA, provides for: a series of national environmental management principles with which all organs of state whose actions may significantly affect the environment must comply (chapter 1); the establishment of a national environmental management advisory forum (Chapter 2); provision for the preparation, publication and implementation of environmental management and implementation plans by government authorities exercising powers which impact on or affect the environment (Chapter 3); procedures for fair decision-making and conflict resolution (Chapter 4); and procedures for integrated environmental management (Chapter 5). For a full discussion on the above statutory mechanisms, see: Baatjies R "The Evolution of Intergovernmental Relations and the Promise of Cooperative Governance" (2009) 11(4) *Local Government Bulletin* 11-14; Kotze "Environmental Governance" in Paterson et al *Environmental Compliance and Enforcement in South Africa* (2009) 103-125; Du Plessis (2008) *SA Public Law* 87-110; Edwards T "Cooperative Governance in South Africa, with Specific Reference to the Challenges of Intergovernmental Relations" (2008) 27(1) *Politeia* 65-85; Department of Provincial and Local Government *Practitioners Guide to Intergovernmental Relations in South Africa* (2007) 51-78; Community Law Centre *A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Framework Act* (2006) University of Western Cape Bellville; and Malan L "Intergovernmental Relations and Co-operative Government in South Africa: The Ten-Year Review" (2005) 24(1) *Politeia* 226-243.

[6] Non-statutory initiatives include the establishment of MINMEC structures and MINTECH structures and the signing of service delivery agreements between various national and provincial authorities. The MINMEC structures are 'political committees' generally comprising of the national line function Minister, Deputy Minister, nine provincial MECs in the same functional area and local government representatives. Their function is to achieve 'political harmony' through coordinated national, provincial and local decision-making. The MINTECH structures are 'technical committees' comprising of the national line function Director-General and his/her respective provincial Head of Departments. Their function is generally to achieve 'administrative or technical harmony' within the different spheres of government. For further information on these structures, see: *Practitioners Guide to Intergovernmental Relations in South Africa* (2007) 66-67; and Malan (2005) *Politeia* 233-234. These initiatives have recently been complemented by the signing of service delivery agreements between national and provincial authorities to improve the coordination of the functions and responsibilities. Take for instance the recent *Service Delivery Agreement* (dated 30 September 2010*)* signed between the Department of Environmental Affairs and the Provincial Environmental Departments and Conservation Agencies to aid the attainment of Outcome 10 (Environmental Assets and Natural Resources that are Valued, Protected and Continually Enhanced) of the Government's 12 Performance Outcomes identified by the Minister of Performance and Monitoring Evaluation in February 2010.

[7] Perhaps the most relevant of these was the following report commissioned by the Government over a decade ago: Wynberg R & Kepe T *Land Reform and Conservation Areas in South Africa. Towards a Mutually Beneficial Approach* (1999) IUCN-ROSA Harare. It proposed the development of a common framework, underpinned by a range of principles aimed at fostering cooperation between land reform authorities and conservation authorities in all three spheres of government.

analysis, the focus of both of these initiatives is exceedingly narrow and they are beset by theoretical and practical problems. They consequently operate in a manner that I will argue shrouds an array of governance options present in South Africa's domestic legal framework for implementing CCAs. The second part of the chapter focuses on these apparently misunderstood governance options which theoretically provide domestic stakeholders with a far more diverse and nuanced array of tools for balancing the country's conservation and land reform agendas. In order to highlight these governance options, I briefly return to the issue of protected areas governance. I do so with a view to objectively clarifying the potential role communities can play in protected areas and extracting an array of potential governance options to enable them to do so. I then consider South Africa's current legal landscape, discussed in detail in Chapter 5 and Chapter 6, to illustrate the extent to which it caters for the implementation of these governance options.

2. RECENT GOVERNMENT INITIATIVES TO LINK CONSERVATION AND LAND REFORM

Two tangible steps have been taken by the Government specifically to permeate the apparent barrier between the conservation and land reform domains: first, the conclusion of a *Memorandum of Agreement*[8] between the land reform and conservation authorities in 2007 to clarify their roles regarding the settlement of land restitution claims in protected areas; and secondly, the publication of a *National Co-Management Framework*[9] in 2010, aimed at guiding the settlement of such claims.

2.1 *MEMORANDUM OF AGREEMENT*

The first tangible step to bridge the conservation and land reform domains was the conclusion of a *Memorandum of Agreement* between the former Minister of Agriculture

[8] Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007) dated 2 May 2007.
[9] Department of Environmental Affairs *National Co-Management Framework* (2010).

and Land Affairs and the Minister of Environmental Affairs and Tourism in 2007.[10] Its preamble expressly recognises the legitimate right of several claimants to land situated in protected areas and the need for the Department of Land Affairs (now the DRD&LR) and the Department of Environmental Affairs and Tourism (now the DEA) to cooperate in their resolution.[11] The parties agreed on a series of fundamental principles to guide the settlement of these claims, which crucially include:[12]

- The roles and responsibilities of the DRD&LR and the DEA in resolving such claims must be clearly defined.
- Close cooperation between these two departments must be fostered.
- Protected areas are assets of national and international importance and their perpetual conservation is a non-negotiable imperative.
- Ownership of land by claimants without physical occupation does not necessarily compromise conservation.
- Co-management must take place in a manner that is sustainable, effective and compatible with relevant conservation and development mandates.
- Restitution settlements must uphold the principles of economic viability, financial sustainability and holistic management.
- Restitution settlements should further uphold the principles of economic viability and result in tangible and realistic direct and indirect benefits for land claimants.
- Restoration should be equitable and should not place land claimants in a less advantageous position.
- The award of access rights must be clearly defined.
- Post-settlement land-use must be compatible with biodiversity conservation.
- Claimants must be prohibited from alienating land restored to them other than to the Government.

[10] For a full discussion of the *Memorandum of Agreement* and its attached *Operational Protocol*, see: De Koning M & Marais M "Land Restitution and Settlement Options in Protected Areas in South Africa" (2009) 39(1) *Africanus* 66-79.
[11] *Memorandum of Agreement* (2007) 4.
[12] *Memorandum of Agreement* (2007) 8-10.

- Communities with land claims in protected areas should be given preference in respect of any land tenure upgrading and development projects undertaken on land situated adjacent to the protected area.
- A clear communication strategy is essential for implementing the framework.

The remainder of the agreement simply repeats these principles in various forms with the only real additions being that: title in land shall be granted to communities where feasible and applicable; co-management is the chosen form of governance for resolving the land reform and conservation interface; management responsibility is left to existing management authorities unless the environmental authorities choose to review it; and a phased *Operational Protocol*[13] for settling such land claims must be adopted.

The *Memorandum of Agreement*, together with its *Operational Protocol*, must be commended for its distillation of a clear procedural framework for ensuring cooperation between the DRD&LR and DEA in resolving land restitution claims situated in protected areas. As highlighted above, however, there is a far broader range of government authorities and institutions that have a role to play or stake in the process.[14] The most notable of these would be the traditional leadership institutions (which continue to play a significant role in rural land administration) and the district and local municipalities (whose mandate it is to promote regional and local planning and development). The failure of the *Memorandum of Agreement* to acknowledge these other government authorities and institutions may well undermine its utility.

Furthermore, certain substantive aspects regarding the approach to settling the land claims are potentially problematic. The first is the apparent aversion to the option of physical occupation, which in certain contexts may be a viable and desirable option.

[13] The *Operational Protocol* envisages the following six stages and identifies which institution is responsible for each: lodgement and registration of the land claim (DRD&LR); screening and categorisation of the land claim (DRD&LR); determination of the validity of the claim and establishment of communal legal body (DRD&LR, Commission on the Restitution of Land Rights (CRLR) and DEA); negotiation of the settlement of the claim (CRLR, DRD&LR and DEA); signing of the settlement agreement (Minister of Rural Development and Land Reform); implementation of the settlement agreement (DRD&LR and DEA).

[14] For a full discussion of these government authorities and institutions, see: Chapter 5 (Part 3.3) and Chapter 6 (Part 5).

The second is the default allocation of management to existing authorities, which while desirable from a continuity perspective, may preclude the potential valuable role communities can play in managing the area. The third is the apparent adoption of an all or nothing approach to the issue of tenure (the grant of full title or no title) notwithstanding the land reform regime recognising a diverse array of land tenure options. The fourth is the reliance placed on one model of governance, namely co-management, to the exclusion of other viable models such as joint management and communal management. The fifth is the lack of clarity regarding what exactly constitutes co-management. The final problem is the continued ambiguity as to the role played by the many additional ministries, departments and institutions, other than DRD&LR and DEA, in the land restitution process.

2.2 *NATIONAL CO-MANAGEMENT FRAMEWORK*

In an effort to provide further clarity on the chosen form of governance for resolving the conservation and land reform interface, the Government recently published a *National Co-Management Framework*.[15] Prepared by a task team comprising of members from relevant national and provincial land and conservation authorities[16] and officially launched at the fourth People and Parks Conference convened in August 2010, the stated purpose of the document is to provide 'a broad framework of the principles to be implemented for the establishment of co-management arrangements on protected areas'.[17]

2.2.1 *The 'Co-Management Models'*

Not surprisingly based on the fundamental principles highlighted in the above *Memorandum of Agreement*, the *National Co-management Framework* identifies three

[15] For a comprehensive discussion of the background to and content of the *National Co-management Framework* see: De Koning M "Co-Management and Its Options in Protected Areas in South Africa" (2009) 39 (2) *Africanus* 5-17.
[16] The task team comprised of representatives from: DEA; DRD&LR; Chief Land Claims Commissioner; Isimangaliso Wetland Park Authority; South African National Parks; Ezemvelo KZN Wildlife; Mpumalanga Tourism and Parks Authority; and the erstwhile Eastern Cape Parks Board.
[17] *National Co-Management Framework* (2010) 2.

models of co-management, namely: full co-management; full lease; and part lease and part co-management. It furthermore identifies the forms of 'beneficiation'[18] associated with each model. These include: revenue sharing; rental income; capacity building; development rights; mandatory partner status in management and development opportunities; equity partnerships in private sector tourism concession enterprises; access rights; natural resource use; and participation in management through representation on the management authority, employment and contractual delegation of certain management functions to community enterprises.[19]

Under the *'full co-management model*', claimant communities are allowed to participate actively in the management and tourism development of the protected area.[20] Whilst final decision-making power would appear to remain vested in the existing management authority, this model anticipates community representation on this authority and consultation with the claimant community on the management of, and tourism development within, the area. Beneficiation options under this model include: ensuring communal access to the protected area for cultural reasons and the use of natural resources situated within its borders; identifying specific tourism development sites within the protected areas and affording the claimant community development rights in respect of these sites; allocating a share of revenue derived from the protected area to the claimant community; and employing community members in tourism and conservation activities within the protected area.[21] Notwithstanding the extensive forms of beneficiation associated with this model, the *National Co-Management Framework* highlights several potential disadvantages associated with its implementation. These include the: often protracted negotiation process preceding the finalisation of the co-management agreements; the slow transfer of visible benefits to the claimant communities; the management complexities associated with including community members in the management structures; and the imposition of management

[18] 'Beneficiation' is defined to mean 'the acquisition of direct and indirect benefits derived by the claimants from activities to be conducted and operated from the protected area' (*National Co-Management Framework* (2010) 2).
[19] *National Co-Management Framework* (2010) 10-13.
[20] *National Co-Management Framework* (2009) 7-8.
[21] *National Co-Management Framework* (2010) 7.

responsibilities and costs on communities lacking the necessary capacity and resources to service them.[22] Its applicability is furthermore only really feasible in the minority of protected areas that generate a profit and/or in those where future tourism development opportunities are viable.[23]

As its name suggests, the '*full lease model'* envisages the conclusion of a lease between the claimant community and the Government. Various types of leases are proposed, the selection of which is dependent on the nature of the protected area, the extent and variability of any income derived by it, and the level of associated financial administration that the management authority wishes to undertake.[24] Owing to the financial implications of this model for Government expenditure, National Treasury approval is a necessary prerequisite.[25] This model is promoted for those protected areas where no viable socio-economic opportunities exist for providing viable beneficiation to the claimant community.[26] The existing management authority retains sole responsibility for managing the protected area, and the claimant community has no access rights, equity rights or development rights.[27] Anticipated benefits associated with this model include: the immediate allocation of guaranteed income to claimant communities; the retention of the management authority as the sole management agency; and the shorter process for concluding the settlement agreement as no co-management agreement need be concluded. Anticipated disadvantages include that the model's feasibility is dependent on National Treasury funding; it excludes the claimant community from participating in the management of the protected area; and it precludes any form of community access, use and development rights over the natural resources

[22] *National Co-Management Framework* (2010) 8.
[23] De Koning M "Returning Manyaleti Game Reserve to its Rightful Owners: Land Restitution in Protected Areas in Mpumalanga, South Africa" (2010) 236 (61) *Unasylva* 41-42.
[24] The forms of lease agreements include: a fixed cash lease (based on the market value and not production value of the land); a flexible cash lease (the quantum of which is based on the income generated by the protected area); a share of income lease (where the income generated by the protected area is divided between the claimant community and the management authority in proportion to their contribution to the costs of managing the protected area); and a percentage share lease (where the claimant community does not contribute to the costs of managing the area but nonetheless receives a percentage of the income). See further: *National Co-Management Framework* (2010) 7-10.
[25] *National Co-Management Framework* (2010) 8.
[26] *National Co-Management Framework* (2010) 7.
[27] *National Co-Management Framework* (2010) 8.

situated within it.[28] These latter two traits raise significant questions about the suitability of including this model under the rubric of a *National Co-Management Framework*.

The *National Co-management Framework* expressly acknowledges that these models should be viewed as situated on a continuum rather than as discreet models.[29] Sitting between the above two models on the co-management continuum is the '*part lease and part co-management model*' which effectively comprises of a blend of aspects of the above two models.[30] The precise nature of this model is not clearly defined in the *National Co-Management Framework*. It would appear that the actual nature of the blend will depend on the socio-economic opportunities provided by the protected area, with existing management authority dictating the level of community participation in its management, and the degree of community access, use and development rights within it.[31]

It is anticipated that the choice of the most appropriate co-management model must be informed by the protected area's existing management plan and a feasibility study undertaken by the management authority to determine the 'sustainable and compatible economic utilization' of the restored land situated in the protected area.[32] Regarding institutional arrangements, the *National Co-management Framework* envisages that the relevant management authority and community property institution to which the land has been restored, establish a co-management committee (CMC) to act as the forum for consulting over, preparing and implementing the relevant co-management option.[33] The CMC is required to meet at least twice a year and only decisions that are duly minuted and agreed to in writing are binding on the parties.[34] The existing management authority is required to provide secretarial support to the co-management committee while each party is required to fund the costs of their representatives participating in it.[35]

[28] Ibid.
[29] *National Co-Management Framework* (2010) 7.
[30] Ibid.
[31] *National Co-Management Framework* (2010) 7-8.
[32] *National Co-Management Framework* (2010) 6 & 10.
[33] *National Co-Management Framework* (2010) 14.
[34] Ibid
[35] Ibid.

2.2.2 *Assessment of the National Co-Management Framework*

The theoretical merits of the co-management model of governance have been well noted by several international and domestic scholars.[36] The *National Co-Management Framework* provides much needed clarity on what the Government views as 'co-management' in the context of protected areas. It clearly spells out the anticipated forms of beneficiation associated with it, the procedures for implementing it and the institutions tasked with such implementation. Furthermore, it provides evidence of improved cooperative governance between the country's land authorities and conservation authorities. However, the *National Co-Management Framework* also raises several theoretical and practical concerns.

From a theoretical perspective, it is uncertain why the Government has chosen exclusively to focus on one component of the protected areas governance continuum, namely that of co-management. The Government appears to have chosen co-management as its model 'irrespective of the history, rationale, and type of land reform', a model which 'may be too weak or inadequate a tool for the challenging land reform process in South Africa'.[37] Why other feasible protected areas governance options attracting increasing international support, such as joint management and community management, are ignored is unclear. This is particularly problematic if one considers that the co-management governance model arose to deal with an entirely distinct context[38] and that several of the conditions which have been identified by commentators

[36] De Koning (2009) *Africanus* 6-7; Borrini-Feyerabend G, Farvar M, Nguinguiri J & Ndangang V *Co-Management of Natural Resources: Organising, Negotiating and Learning-by-Doing* (2007) GTZ & IUCN, Kasparek Verlag Heidelberg 3-4; Hauck & Sowman M *Guidelines for Implementing Coastal and Fisheries Co-Management in South Africa* (2005) Subsistence Fishing Co-Management and Capacity Building Programme, University of Cape Town, Cape Town, 2 & 7; Isaacs M & Mohammed N *Co-Managing the Commons in the 'New' South Africa: Room to Manoeuvre* (2000) Commons Southern Africa: Occasional Paper No.5, CASS/PLAAS Harare/Bellville 2; and Berkes F & Henley T "Co-Management and Traditional Knowledge: Threat or Opportunity?" (1997) 18 *Policy Options* 31.

[37] Kepe T "Land Claims and Co-Management of Protected Areas in South Africa' (2008) 41 *Environmental Management* 311-312.

[38] As concisely summarised by Kepe, the co-management model arose: to conserve scarce resources and not to deal with land reform issues; as a method for governments to co-opt support and improve their legitimacy rather than seeking to provide for meaningful public participation; and as a government-led initiative in respect of government-owned land - not as a community-led initiative in respect of

as necessary prerequisites for its successful implementation[39] are currently absent in South Africa.[40] Furthermore, having opted for co-management, it is surprising that the *National Co-Management Framework* fails to consider the full spectrum of co-management options as identified by the likes of Berkes,[41] Sen and Raajear-Nielson,[42] Tipa and Welch,[43] Dudley[44] and most recently by De Koning.[45] It furthermore has a very strong orientation towards the lease model,[46] a model whose form effectively precludes

communally-owned land (Kepe (2008) *Environmental Management* 314-315). See further: Tipa G & Welch R "Co-Management of Natural Resources: Issues of Definition from an Indigenous Community Perspective" (2006) 42(3) *Journal of Applied Behavioural Research* 373-391; Jentoft S "The Way Forward" in Wilson D, Nielsen J & Degnbol P (eds) *The Fisheries Co-Management Experience: Accomplishments, Challenges and Prospects* (2003) Kluwer Academic Dordrecht 2; M Hara and J Nielsen, 'Experiences with Fisheries Co-Management in Africa' in Wilson D, Nielsen J & Degnbol P (eds) *The Fisheries Co-Management Experience: Accomplishments, Challenges and Prospects* (2003) Kluwer Academic Dordrecht 81-95; Hauck M & Sowman M "Coastal and Fisheries Co-Management in South Africa: An Overview and Analysis" (2001) 25 *Marine Policy* 171-185; and Pomeroy R & Berkes F "Two Can Tango: The Role of Government in Fisheries Co-Management" (1997) 21 (5) *Marine Policy* 465-480.

[39] Berkes identified the following as necessary preconditions for the successful implementation of co-management: the presence of appropriate institutions; trust between partners; legal protection of local rights; and economic incentives for local people (Berkes F "New and Not-So-New Directions in the Use of the Commons: Co-Management" (1997) 42 *The Common Property Resource Digest* 6).

[40] Kepe (2008) 41 *Environmental Management* 314-318. See further: Magome H & Murombedzi J "Sharing South African National Parks: Community Land and Conservation in a Democratic South Africa" in Adams W & Mulligan M (eds) *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (2003) Earthscan London 108-134; and Kepe T, Wynberg R & Ellis W "Land Reform and Biodiversity Conservation in South Africa: Complementary or in Conflict?' (2005) 1 *International Journal of Biodiversity Science and Management* 13.

[41] Berkes draws a distinction between the following levels of co-management: informing; consultation; cooperation; communication; advisory committees; management boards; and partnerships/community control. See further: Berkes F "Co-Managing: Bridging the Two Solitudes" (1994) 22 (2-3) *Northern Perspectives* 19.

[42] Sen and Raajear-Nielsen draw a distinction between the following five types of co-management: instructive, consultative; cooperative; advisory and Informative. See further: Sen S & Raakjaer-Nielson J "Fisheries Co-Management: A Comparative Analysis (1996) 20 *Marine Policy* 406-407.

[43] Tipa and Welch draw a distinction between three types of 'real comanagement', namely: cooperative management; community-based management; and collaborative management. See further: Tipa et al (2006) *Journal of Applied Behavioral Science* 381-387.

[44] Dudley refers to co-management under the rubric of shared governance and draws a distinction between: transboundary management; collaborative management; and joint management. See further: Dudley N (ed) *Guidelines for Applying Protected Area Management Categories* (2008) IUCN Gland 26-27.

[45] De Koning draws a distinction between eight different types of co-management: ad hoc benefit-sharing; consultation benefit-sharing; lease; part lease/part co-management; co-operative co-management; part co-management/part delegated management; delegated management; and privately managed. See further: De Koning (2009) *Africanus* 8-12; and De Koning M "Co-Management in Protected Areas - Presentation & Document prepared for the People & Parks Steering Committee' (dated 12 December 2012) 15-26.

[46] This is reflected, for example, in the skewed attention afforded to the lease option and the unduly positive outlook afforded to it in contrast to the co-management option in both the draft and final National Co-Management Framework. See in this regard: *National Co-Management Framework* (2010) 7-10; and

co-management and whose feasibility is dependent on yet to be secured funding from the National Treasury. As recently highlighted by one member of the Task Team appointed to develop the *National Co-Management Framework*, the underlying reason for this was disagreement amongst Task Team members on the meaning of co-management and the misconception of government authorities that the enabling legislative framework does not provide for shared decision-making.[47]

From a practical perspective, various additional concerns to those raised in the context of the *Memorandum of Agreement* above, are of relevance. Firstly, it is uncertain why the ambit of the *National Co-Management Framework* is limited to agreements concluded under section 42 of the National Environmental Management: Protected Areas Act[48] (Protected Areas Act) when there are several other governance options available in South Africa's statutory framework for promoting a balance between the Government's land reform and conservation agendas.[49] Secondly, the proposed establishment of co-management committees to act as the institutions through which claimant communities and conservation authorities' interests are discussed and negotiated is a welcome addition. However, the absence of mandatory government support to enable claimant community representatives to participate effectively in these meetings may nullify the utility of these institutions.

3. LEGAL OPTIONS FOR LINKING THE CONSERVATION AND LAND REFORM REGIMES

Recent government initiatives to link South Africa's conservation and land reform regimes are to be welcomed. However, as highlighted above, their focus is very narrow and they are fraught with theoretical and practical problems. As a result, they appear to operate in a manner that shrouds an array of governance options present in South Africa's legal framework for implementing CCAs. To extract these governance options

Department of Environmental Affairs and Tourism, Department of Land Affairs, SANParks, Ezemvelo Wildlife & Eastern Cape Parks *Draft National Co-Management Framework* (2009) 3-7.
[47] De Koning (2009) *Africanus* 7-8.
[48] Act 57 of 2003.
[49] These are discussed in Chapter 7 (Part 3.2).

'hidden' within South Africa's legal framework, it is necessary to return briefly to the issue of protected areas governance for two reasons. The first reason is to clarify objectively the potential role communities can play in protected areas. The second reason is to distil an array of governance options to enable them to do so. Having highlighted these options, I will be in a position to consider the domestic legal framework and assess the extent to which it provides for these governance options.

3.1 UNDERSTANDING THE ROLE OF COMMUNITIES IN PROTECTED AREAS

As advocated above, the source of authority within a protected area (embodied in the notion of protected areas governance) is determined by three key components - land tenure, management and beneficiation.[50] If one dissects these three components, it appears that a community can theoretically play four main roles in a protected area - that of owner, manager, developer and beneficiary. Prior to describing each of these roles, it is important to note the following in respect of each of them. First, the nature of the protected area will influence the nature of the role. Secondly, the community can take on one or more of these roles in a protected area. Thirdly, the community can take on these roles independently or in partnership with others.[51] Finally, the role of the community in a protected area can shift over time as its interests, capacity and resources change.

3.1.1 *Owner*

A community can own land situated in a protected area (full title) or hold certain rights over the land or natural resources located in it (rights holder). Where it holds full title, the community will probably be required to enter into an agreement with the Government which: regulates the incorporation of its land into the protected area; imposes certain restrictions on the use of the property; sets out who is responsible for

[50] For a comprehensive discussion of these components of protected areas governance, see: Chapter 2 (Part 3.3.5).
[51] Such partnerships could be entered into with government authorities, other community institutions, companies, non-governmental organisations or other persons.

managing the protected area; clarifies the forms of beneficiation in the protected area; and prescribes the duration of the agreement. Where the community is a rights holder, it will probably also be required to enter into an agreement with the government authority, institution or person responsible for managing the protected area. The agreement will probably: set out who is entitled to exercise these rights; define the nature of the rights; may impose conditions/restrictions on the exercise of these rights; clarify the rights/benefits accruing to each party; spell out the obligations/costs ascribed to each party; and prescribe the duration of the agreement.

3.1.2 *Manager*

The second main role a community can play in a protected area is that of manager. This role envisages a community actively managing the land and natural resources located in a protected area. This management can be undertaken individually or in partnership with other persons or institutions. The responsibility for managing a protected area will probably be prescribed by statute providing for: the formal appointment of a management authority; the preparation and implementation of a management plan; and monitoring and reporting on such implementation. Where the responsibility to manage the protected area is shared between two or more entities, provision will probably be made for the conclusion of a co-management agreement between these entities which sets out the parties' reciprocal rights/benefits and obligations/costs associated with managing the protected area; and the duration of the agreement.

3.1.3 *Developer*

A community can also seek to undertake a commercial development or activity in a protected area. The community may seek to undertake such a development or activity individually or in partnership with others. The nature and form of the development and activity will generally be regulated strictly by statute providing for: the type of development and activity which may be undertaken in the protected area; the management planning framework which should inform its design; any studies and

authorisation processes which should precede its implementation; the people and institutions which must be consulted prior to doing so; and potentially the conclusion of a commercial agreement between relevant stakeholders.[52] The latter commercial agreement will generally set out the nature of the development or activity; the parties' reciprocal rights, benefits, responsibilities and costs associated with it; and the duration of their relationship.

3.1.4 *Beneficiary*

A community may benefit from the establishment of a protected area. The community will generally accrue such benefits through its role as owner, manager and/or developer. A community who operates in none of these capacities may also potentially accrue benefits owing to its historic or current association with the land situated in or adjacent to a protected area.[53] The relationship of the community to a protected area will influence the form of beneficiation[54] and whether it is regulated by statute, agreement, or by a mixture of the two. Where the community is the owner, the form of beneficiation will probably be regulated by the agreement in terms of which the land is contracted into the protected area. Where the community is the manager, the form of beneficiation will probably be regulated by the terms of its designation as the management authority and the terms of the approved management plan for the protected area. Where the community operates as a developer, the form of beneficiation will probably be regulated by a commercial agreement entered into with the protected area's management authority. Where the beneficiary is a third party (in other words does not operate in any of the above capacities), the form of beneficiation will probably either be regulated by:

[52] These stakeholders could include: government authorities; the management authority; the owners of the protected area; people who hold rights in the protected area where the development or activity will take place; and neighbouring landowners and communities.
[53] A typical example of this would be a community who successfully asserts its rights to land situated in a protected area but by way of agreement forgoes these rights in favour of compensation or other forms of benefits. These forms of benefits could include: training; employment; access to facilities located in the protected area; the supply of basic goods, services and products to the protected areas and those visiting it; the allocation of government grants and/or a share of proceeds generated by the protected area to develop/uplift those areas adjacent to it.
[54] For a discussion of these forms of beneficiation, see: Chapter 2 (Part 3.3.5).

an agreement between the community and the management authority, developer, government authority and/or non-profit organisation; or by way of statute.

3.2 CURRENT LEGAL OPTIONS FOR FACILITATING THE ROLE OF COMMUNITIES IN PROTECTED AREAS

Communities can clearly play many different roles in protected areas. The nature of these roles will vary considerably in each case but can theoretically be grouped under the following six main governance options: owner/manager; owner/co-manager; owner/beneficiary; non-owner/manager; non-owner/co-manager; and non-owner/non-manager/beneficiary. As mentioned above, these governance options are not cast in stone and a community may shift between them over time. For instance, a community may wish to commence its relationship to the protected area under the owner/beneficiary option. As its management skills, capacity and resources increase the community may then wish to migrate to the owner/co-manager option, sharing the management authority with another person or institution. Finally, as the community's skills, capacity and resources increase further, it may wish to take over the management of the protected area single-handedly thereby entering the owner/manager option.

If one surveys South Africa's current legal landscape, it becomes apparent that it contains the requisite legal tools for implementing each of these six governance options to bridge the conservation and land reform interface. The nature of these options and the legal process for implementing each of them is discussed below. The legal process is distilled from the comprehensive analysis of South Africa's conservation and land reform regimes contained in Chapter 5 and Chapter 6 respectively. It is accordingly discussed in a very precursory manner to avoid unnecessary duplication.[55] It is furthermore discussed from a national perspective as it is predominantly under the

[55] Cross-references are included here to those sections of Chapter 5 and Chapter 6 where the detailed legal procedures are discussed.

national conservation and land reform regime that CCAs have been, and will continue to be, regulated.[56]

3.2.1 *Owner/Manager Option*

Under this option the community owns, or will own, the land already located, or to be located, in the protected area. The community also currently manages, or wish to manage, the protected area. It would therefore take on the role of owner and manager. The legal process to be followed in implementing this option, detailed in Figure 4 below, will depend on whether one is dealing with an existing protected area or the desire to create a new protected area.

Where one is dealing with an existing protected area, two separate yet related legal processes will need to be followed: those relating to ownership; and those relating to management. Regarding ownership, the community would need to establish an appropriate institution to hold ownership.[57] It would thereafter have to comply with the land restitution process as prescribed in the Restitution of Land Rights Act.[58] Regarding management, the community would need to comply with the management regime set out in the Protected Areas Act.[59] Where one is dealing with a new protected area, the above two legal procedures would be intersected by a third, that relating to establishment. Here the community would in addition need to comply with the procedures set out in the Protected Areas Act for establishing the protected area.[60]

[56] The legal procedures may vary in the provincial context where provincial conservation laws are used to establish and regulate the management of the protected area. A discussion of the nuanced provincial procedures unfortunately falls outside the purview of this dissertation.
[57] The array of possible institutions (and the laws regulating their formation and management) include: communal property association (Communal Property Association Act (28 of 1996)); Trust (Trust Property Control Act (57 of 1998)); Section 21 Company (Companies Act (61 of 1973)); Private Company (Companies Act (61 of 1973)); and a Closed Corporation (Closed Corporations Act (69 of 1984)).
[58] Act 22 of 1994. For a detailed discussion of this process, see Chapter 6 (Part 2.1).
[59] For a detailed discussion of this regime, see Chapter 5 (Part 3.1.2).
[60] For a detailed discussion of this procedure, see Chapter 5 (Part 3.1.2).

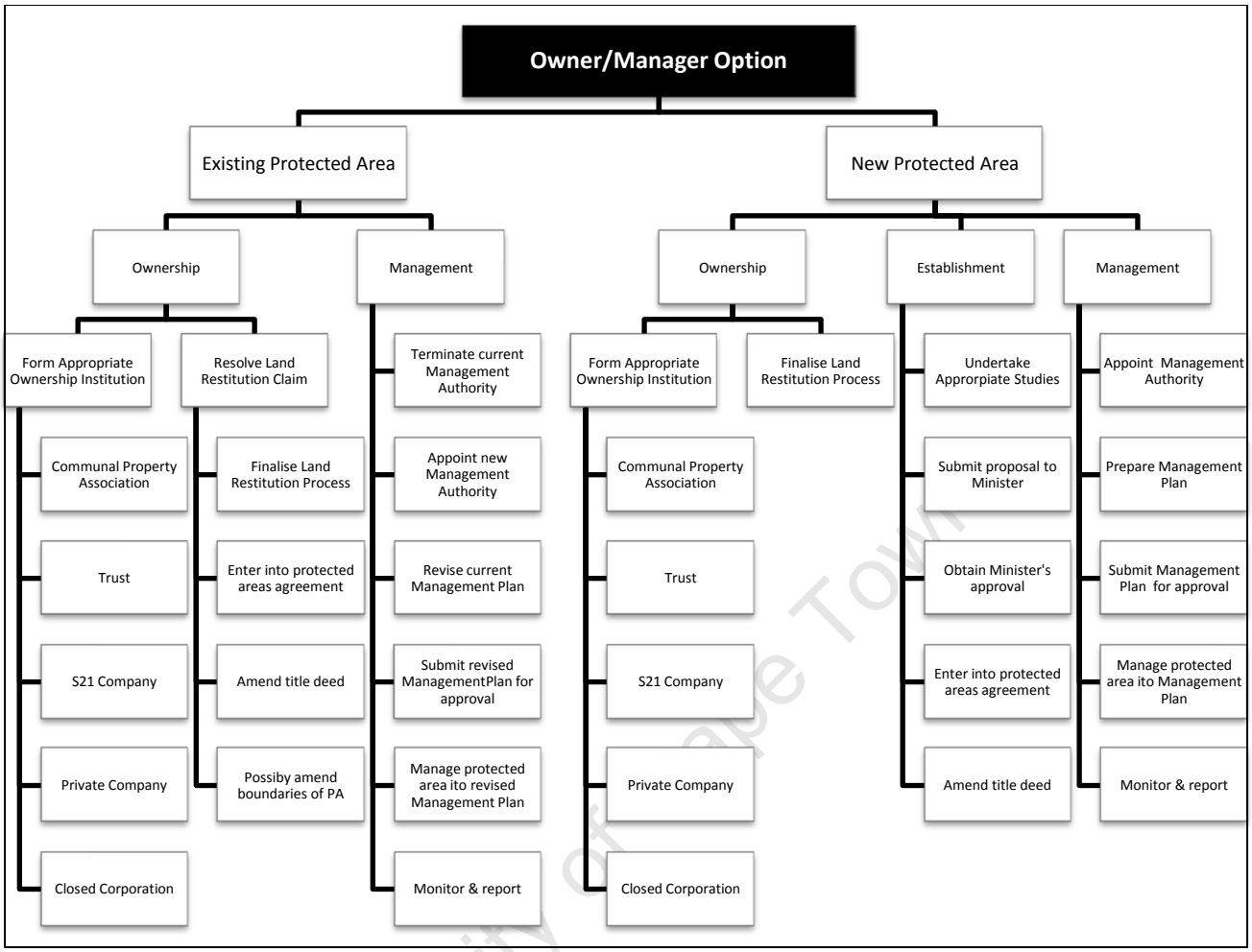

FIGURE 4: Owner/Manager Option

3.2.2 *Owner/Co-Manager Option*

Under this option the community similarly owns, or will own, the land already located, or to be located, in the protected area. The community wishes to share the current or future responsibility to manage the protected area with another person or institution. It would therefore take on the role of owner and co-manager. This option is facilitated by the fact that the Protected Areas Act provides for the conclusion of co-management agreements between the management authority for the protected area and a third parties.[61] It mimics the co-management option set out in the *National Co-Management*

[61] For a detailed discussion of the nature, form and process, which must precede the conclusion of a co-management agreement, see Chapter 5 (Part 3.1.2).

Framework.[62] The legal process that would need to be followed to implement this option is detailed in the Figure 5 below. It will similarly depend on whether one is dealing with an existing protected area or the desire to create a new protected area.

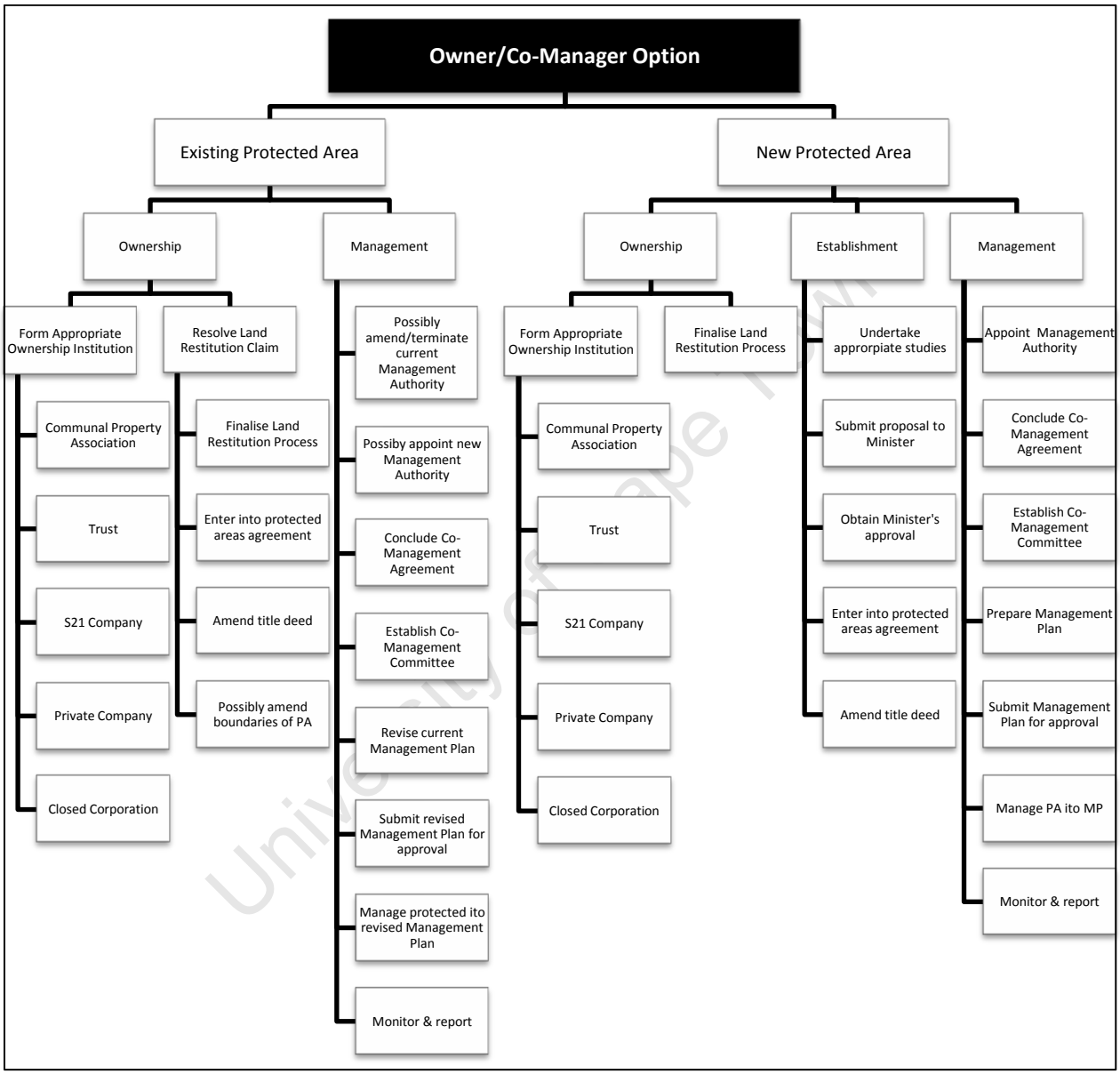

FIGURE 5: Owner/Co-Manager Option

Where one is dealing with an existing protected area, the same two separate yet related legal processes to that described above under the owner/manager option need to be

[62] For a discussion of this co-management option under the *National Co-Management Framework*, see Chapter 7 (Part 2.2).

followed. Regarding ownership, the community would need to establish an appropriate institution to hold ownership[63] and thereafter comply with the land restitution process as prescribed in the Restitution of Land Rights Act.[64] Regarding management, the community would need to comply with the management regime set out in the Protected Areas Act with the added requirement of concluding a co-management agreement to regulate the co-management relationship.[65] Where one is dealing with a new protected area, the above two legal procedures would be intersected by a third, that relating to establishment. The community would in addition need to comply with the procedures set out in the Protected Areas Act for establishing the protected area.[66]

3.2.3 *Owner/Beneficiary Option*

Under this option the community owns, or will own, the land already located, or to be located in a protected area. It does not wish to take on the role of manager, which task is assigned to another person or institution. As a result of its ownership, the community accrues certain rights or benefits associated with the protected area. The community therefore takes on the role of owner and beneficiary.

The nature of the legal process regulating ownership of the protected area and the nature of the community's rights or benefits associated with it will differ significantly. A broad distinction needs generally to be drawn between the restitution context (where the issue of beneficiation is, or was, addressed in the agreements underpinning the settlement of the claim) and the general context (where the issue of beneficiation was not addressed). The legal process that would need to be followed in implementing this option is detailed in Figure 6 below.

[63] For a list of these potential institutions (and the laws that regulate them), see note 57 above.
[64] For a detailed discussion of this process, see Chapter 6 (Part 2.1).
[65] For a detailed discussion of this regime, see Chapter 5 (Part 3.1.2).
[66] For a detailed discussion of this procedure, see Chapter 5 (Part 3.1.2).

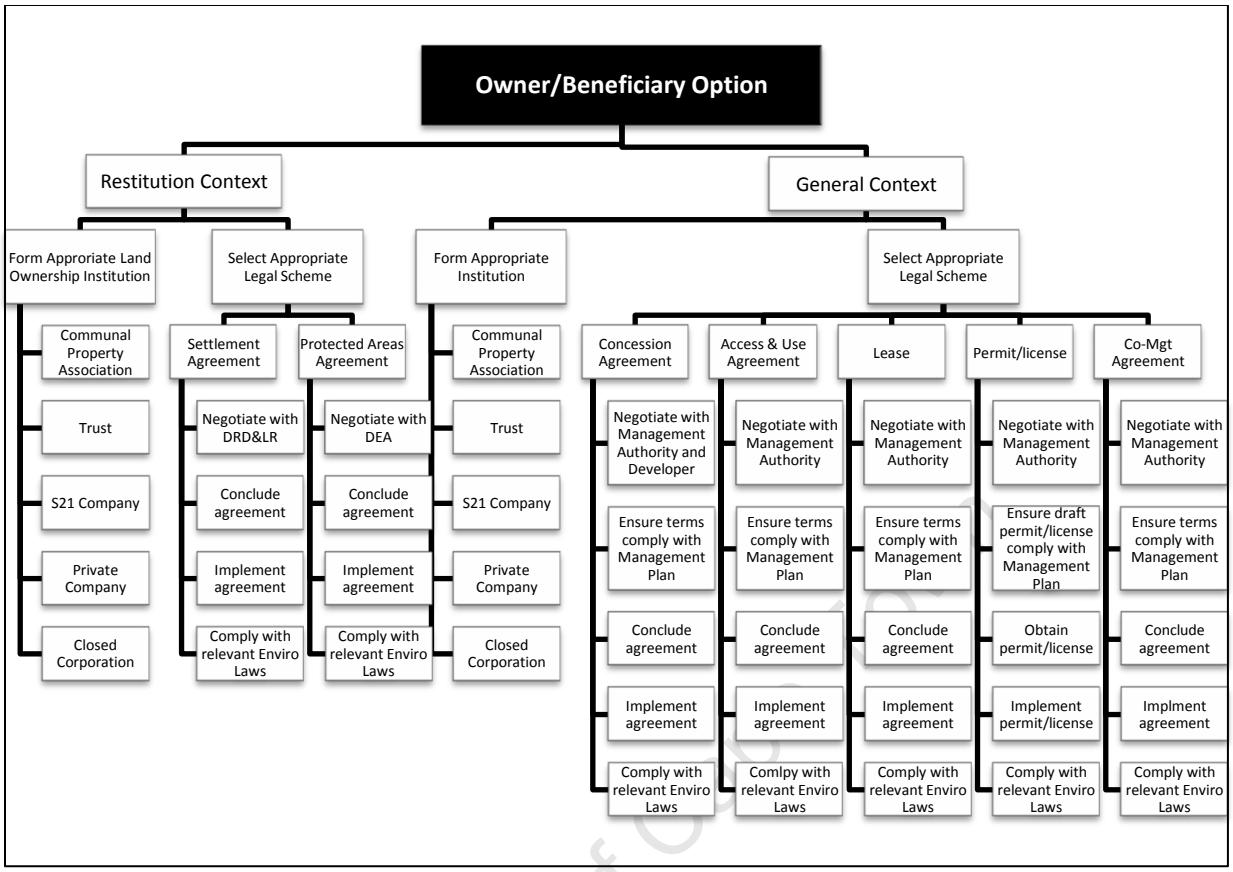

FIGURE 6: Owner/Beneficiary Option

In the restitution context, the community would firstly need to establish an appropriate institution to hold ownership[67] and thereafter select and implement the appropriate legal scheme to regulate the rights or benefits accruing to it. The two available legal schemes are the settlement agreement concluded under the Restitution of Land Rights Act,[68] or an agreement concluded under the Protected Areas Act[69] in terms of which the community agree to contract their land into the protected area.[70] In the general context the community would similarly need to establish an appropriate institution to hold any

[67] For a list of these potential institutions (and the laws that regulate them), see note 57 above.
[68] For a detailed discussion of the nature, form and process, which must precede the conclusion of a settlement agreement, see Chapter 6 (Part 2.1).
[69] For a detailed discussion of the nature, form and process that must precede the conclusion of a protected areas agreement, see Chapter 5 (Part 3.1.2).
[70] These two agreements will generally set out the rights and benefits of the successful land claimant community in respect of the protected area. These could include: decision-making rights; access rights; occupation rights; resource use rights; commercial rights; equity rights; lease benefits; employment benefits; and grant benefits. For a full description of these rights and benefits, see Chapter 2 (Part 3.3.5).

rights/benefits accruing from the protected area.[71] Thereafter, it would similarly need to select and implement the appropriate legal scheme to regulate their rights or benefits. Here the available legal schemes are more diverse and include: concession agreements;[72] access, use and lease agreements;[73] permits and licenses;[74] and co-management agreements.[75]

3.2.4 *Non-Owner/Manager Option*

Under this option a community that does not own the land located in a protected area, wishes to take on the management of the protected area or some of the resources situated within it. The community would therefore take on the role of non-owner and manager. This option is based on the presumption that all issues regarding ownership and the establishment of the protected area have been resolved. One is therefore dealing here solely with the issue of management. The legal process that would need to be followed in implementing this option is detailed in Figure 7 below.

[71] For a list of these potential institutions (and the laws that regulate them), see note 57 above.
[72] The Protected Areas Act allows management authorities of certain protected areas to conclude commercial/concession agreements with communities to undertake commercial developments and activities in the protected area. For further discussion on the nature, form and process that must be precede the conclusion of these concession agreements, see Chapter 5 (Part 3.1.2).
[73] The Protected Areas Act allows management authorities of certain protected areas to conclude agreements and leases with communities to use in a sustainable manner of biological resources located in the protected area. For further discussion on the nature, form and process that must be precede the conclusion of these lease agreements, see Chapter 5 (Part 3.1.2).
[74] The Protected Areas Act allows management authorities of certain protected areas to grant permits/licenses to communities to use in a sustainable manner of biological resources located in the protected area. For further discussion on the nature, form and process that must be precede the issue of these licenses or permits, see Chapter 5 (Part 3.1.2).
[75] The Protected Areas Act allows management authorities to conclude co-management agreements with people to regulate human activities that affect the environment in the protected area. These agreements do not only relate to co-management of the protected area, but can also include: the apportionment of any income generated from the management of the protected area or any other form of benefit-sharing between the parties; the use of biological resources in the protected area; access to and occupation of the protected area; the development of economic opportunities within and adjacent to the protected area; the development of local management capacity and knowledge exchange; and the offering of financial and other support. For further discussion on the nature, form and process that must be precede the conclusion of these co-management agreements, see Chapter 5 (Part 3.1.2).

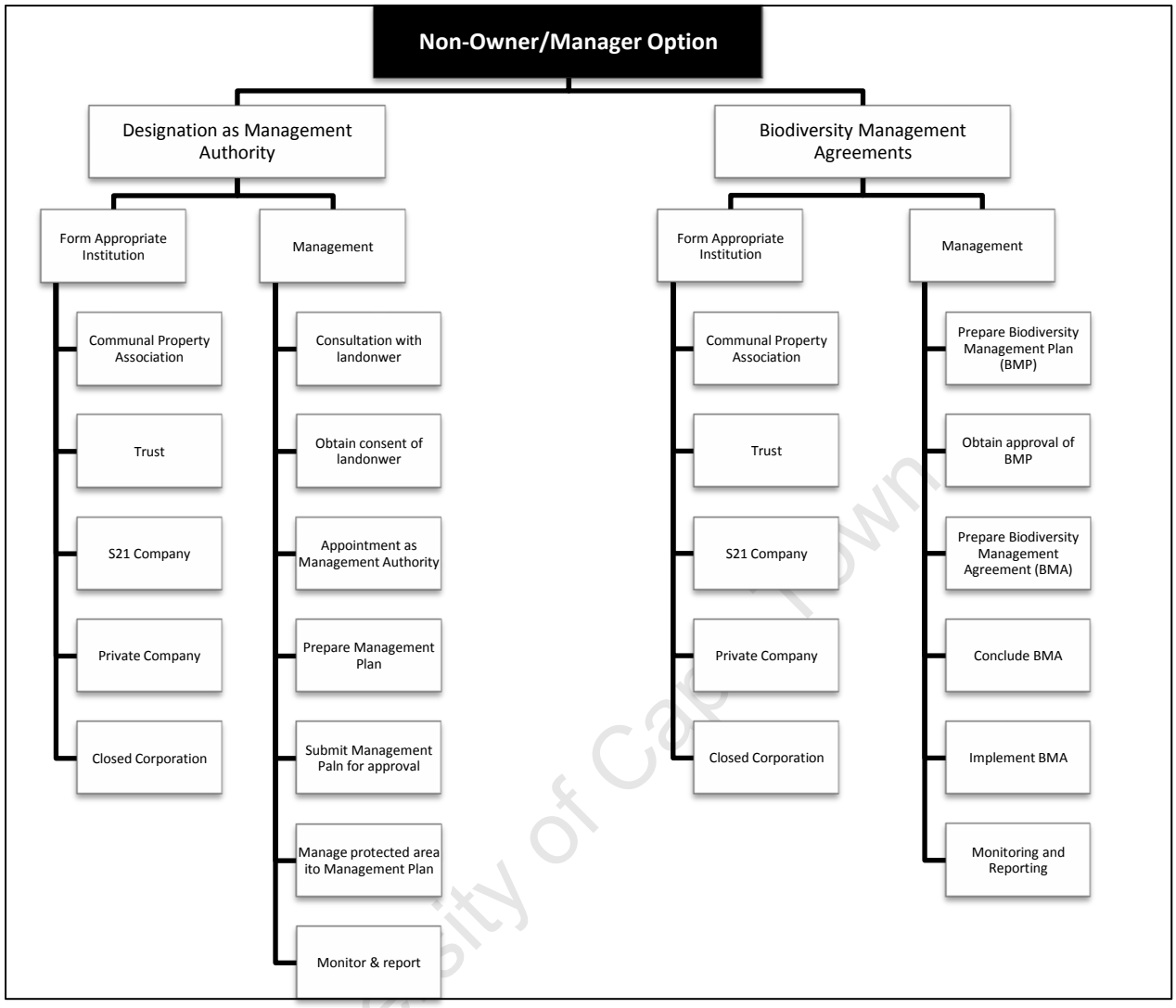

FIGURE 7: Non-Owner/Manager Option

This option is enabled by the country's conservation regime allowing a community to manage a protected area or the biological resources situated within it, even where it does not own the land or resources situated within it. This is provided for in two main ways: their designation as the management authority for the area;[76] or the conclusion of a biodiversity management agreement between them and the designated management

[76] For a detailed discussion on the process prescribed in the Protected Areas Act for being appointed as a management authority for a protected area, see Chapter 5 (Part 3.1.2).

authority.[77] Prior to entering into either of the above management arrangements, the community would need to establish the appropriate institution to enable them to do so.[78]

3.2.5 *Non-Owner/Co-Manager Option*

Under this option a community that does not own the land located in a protected area, wishes to participate in the management of the protected area, but wishes to do so in partnership with one or more persons or institutions. They would therefore take on the role of non-owner and co-manager. A distinction needs to be drawn between where the community has been appointed as the designated management authority for a protected area and wishes to share the management responsibility with another person or institution; and where the community is this latter institution within whom the designated management authority wishes to share such management. The legal process that would need to be followed to implement this option is detailed in Figure 8 below.

This option is, as in the owner/co-manager model, enabled by the country's conservation regime allowing a management authority to enter a co-management agreement with another person or institution.[79] Where the community is the designated management authority it would need to identify a prospective co-manager and comply with the procedures set out in the Protected Areas Act for concluding a co-management agreement with this person or institution. Where the community is not the designated management authority, it would firstly need to form an appropriate institution and thereafter conclude a co-management agreement with the designated management authority.

[77] For a detailed discussion on the nature, form and process prescribed in the Biodiversity Act for concluding biodiversity management agreements, see Chapter 5 (Part 3.1.1).
[78] For a list of these potential institutions (and the laws that regulate them), see note 57 above.
[79] For a detailed discussion on the nature, form and process that must be precede the conclusion of these co-management agreements, see Chapter 5 (Part 3.1.2).

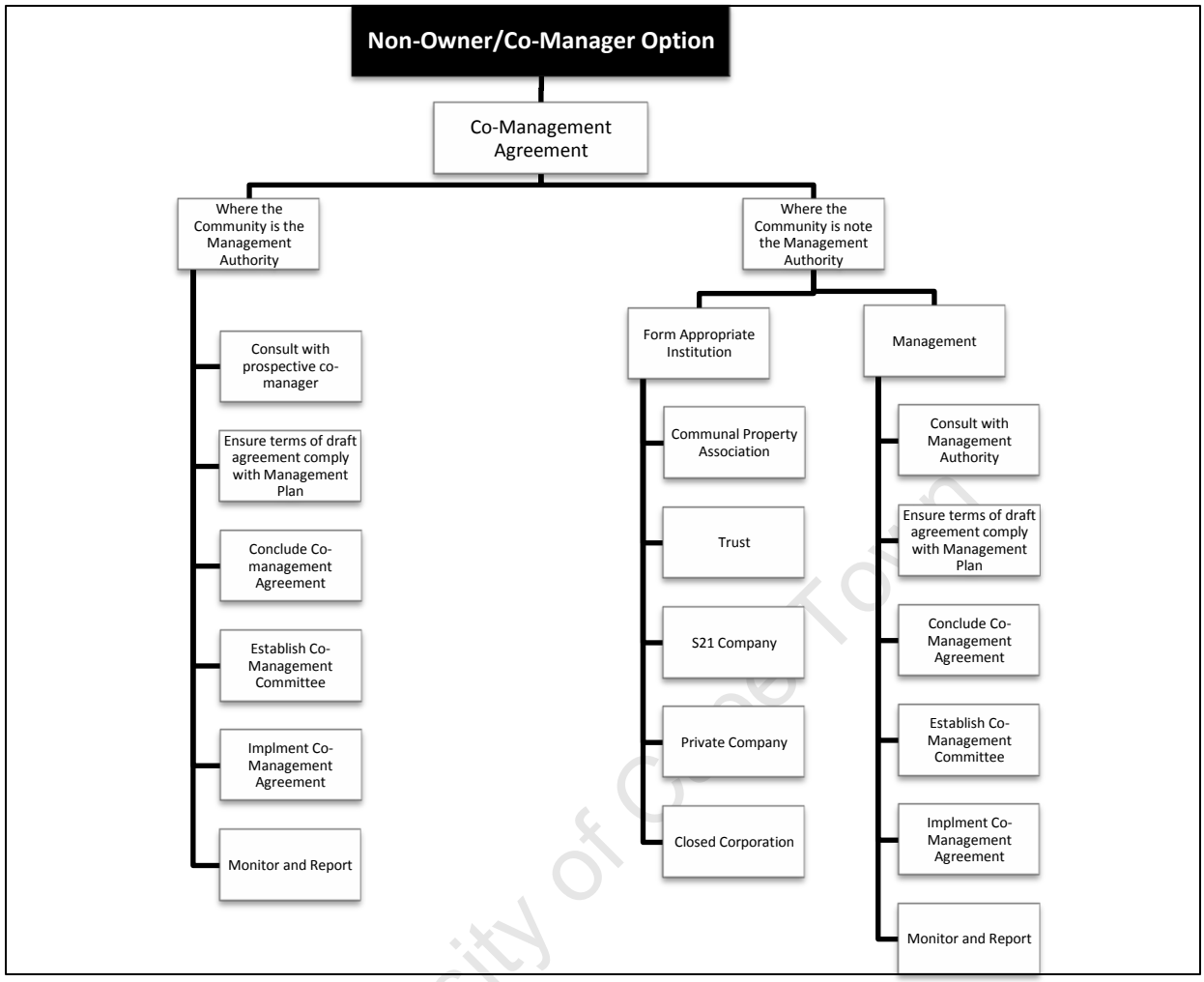

FIGURE 8: Non-Owner/Co-Manager Option

3.2.6 *Non-Owner/Non-Manager/Beneficiary Option*

Under this final option, the community neither owns nor manages the land located in the protected area. They accordingly accrue no rights or benefits associated with these roles. Any rights or benefits accruing to the community from the protected area arise through an array of external legal transactions. One is therefore dealing here solely with the issue of beneficiation. The nature of the legal process regulating forms of beneficiation associated with the protected area will differ significantly. The legal process that would need to be followed to implement this option is detailed in Figure 9 below.

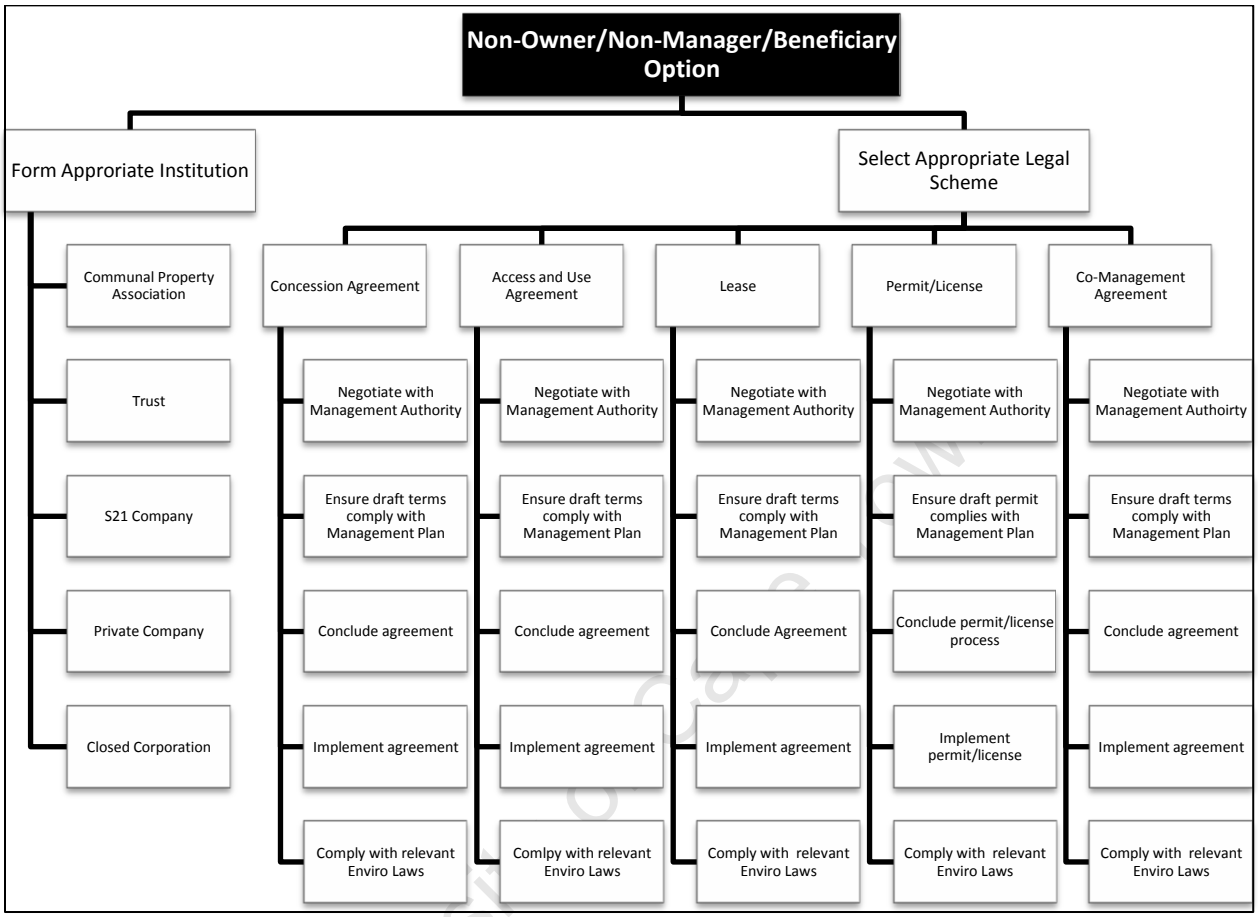

FIGURE 9: Non-Owner/Non-Manager/Beneficiary Option

A general distinction needs to be drawn between two main legal processes: the formation of the appropriate institution to accrue the rights or benefits where no such institution exists;[80] and the selection and implementation of an appropriate legal scheme to regulate the nature of these rights or benefits. Here the available legal schemes are diverse and include: concession agreements; access, use and lease agreements; permits and licenses; and co-management agreements.[81]

[80] For a list of these potential institutions (and the laws that regulate them), see note 57 above.

[81] The Protected Areas Act allows management authorities to conclude an array of agreements with a community, and issue permits/licenses to it, to enable it to: undertake commercial developments/activities in the protected area; access, use and share natural resources situated in the protected area; and share in the benefits derived from such activities. For a detailed discussion on the nature, form and process which must precede the agreements and permitting schemes, see Chapter 5 (Part 3.1.2).

4. CONCLUSION

In this, the concluding Chapter of Part II of the dissertation, I considered two main aspects relevant to linking South Africa's disparate conservation and land reform regimes. The first part of the Chapter considered recent Government initiatives specifically aimed at facilitating improved cooperative governance between these two regimes, namely the *Memorandum of Understanding* and the *National Co-Management Framework.* While clearly providing valuable guidance to administrators tasked with settling the outstanding communal land restitution claims in protected areas, I sought to illustrate through my critical appraisal of the content of these two documents, their inherent theoretical and practical frailties. Perhaps the most significant of these frailties is the entrenchment of co-management, and an exceptionally narrow formulation of it, as the favoured governance option for perpetuating CCAs in South Africa. I argued that the narrow vision espoused in these documents shrouds several other governance options provided for within South Africa's domestic legal framework for implementing CCAs. I suggested further that this might in turn undermine the role of CCAs as tools for bridging South Africa's conservation and land reform regimes.

In the second part of this Chapter, I focused on these apparently misunderstood governance options that theoretically provide domestic stakeholders with a far more diverse and nuanced array of tools for linking the country's conservation and land reform regimes. In order to unpack these governance options, I briefly returned to the issue of protected areas governance and identified an array of governance options which underpin the implementation of CCAs, namely: owner/manager; owner/co-manager; owner/beneficiary; non-owner/manager; non-owner/co-manager; and non-owner/non-manager/beneficiary. I thereafter illustrated how South Africa's current relevant legal framework caters for the implementation of each of these governance options.

This brings me to the end of Part II of the dissertation in which I have critically considered the complex web of domestic laws, policies, programmes and institutions of potential relevance to CCAs. South Africa appears on paper to have a comprehensive legal framework for establishing and managing such areas. However, as I have highlighted in the above analysis of its various components, the regime is beset by several inherent problems. To better illustrate these problems, and the various opportunities which exist for resolving them, one must critically reflect on the manner in which the Government has implemented the various components of this regime to fulfil its conservation and land reform agendas. This forms the focus of Part III of the dissertation, which critically considers the functioning of four domestic CCAs established during the course of the past two decades.

PART III

THE PRACTICE

Having canvassed South Africa's legal framework of relevance to communally-conserved areas in Part II of this dissertation, Part III evaluates the manner in which domestic administrators have sought to implement it. This evaluation is undertaken through two distinct yet related enquiries: first, through the consideration of four domestic case studies; and secondly, by way of an assessment of the extent to which these case studies reflect the presence or absence of the essential elements underlying communally-conserved areas highlighted in Chapter 3. Part III is accordingly divided into two chapters. Chapter 8 (titled *South Africa's Experimentation with Communally-Conserved Areas*) considers four South African case studies in which domestic administrators have sought to use the legal framework discussed in Part II to bridge the country's conservation and land reform mandates. The case studies are: the Richtersveld National Park; the Pafuri Region of the Kruger National Park; the Dwesa-Cwebe Nature Reserve; and the Eastern Shores Region of the Isimangaliso Wetland Park. These case studies are the best documented in South Africa and have been central in shaping the country's contemporary legal regime of relevance to communally-conserved areas. Within this chapter, I briefly set out the history of each communally-conserved area and detail the different governance options and elements that underpin them. Chapter 9 (titled *Evaluating South Africa's Experimentation with Communally-Conserved Areas*) critically assesses the extent to which the case studies reflect adherence to the essential elements that theoretically underlie successful communally-conserved areas. This chapter does not provide an exhaustive analysis of the extent to which each case study reflects the presence or absence of each of these elements. It rather seeks to draw pertinent examples from the four case studies which: illustrate the challenges faced by domestic policy-makers in giving domestic effect to these elements; highlight inherent strengths and frailties of the existing legal framework; and hold lessons for future legislative reform.

CHAPTER 8

SOUTH AFRICA'S EXPERIMENTATION WITH COMMUNALLY-CONSERVED AREAS

1. INTRODUCTION

South Africa's policy-makers have been experimenting with introducing communally-conserved areas (CCAs) for the past two decades. Using elements of the domestic conservation and land reform regimes discussed in Part II of this dissertation, some 43 communal land restitution claims in protected areas have been settled to date.[1] The practical outcome of these settlements effectively constitutes South Africa's experimentation with CCAs. While it would be desirable to consider all communal land restitution settlements in protected areas in order to evaluate the merits of the domestic regime, it is simply unfeasible to do so within the scope of this dissertation. Furthermore, selecting but one example would preclude a critical comparison of the diverse governance options that underpin them. I have accordingly selected four case studies, namely: Richtersveld National Park (Richtersveld case study); the Pafuri Region of the Kruger National Park (Makuleke case study);[2] the Dwesa-Cwebe Nature Reserve (Dwesa-Cwebe case study); and the Eastern Shores Region of the Isimangaliso Wetland Park (the Bhangazi case study).[3]

The purpose of this chapter is briefly to describe the history of each of the case studies and detail the governance options that underpin them. It draws from the comprehensive research undertaken by several anthropologists, sociologists, ecologists and

[1] Department of Environmental Affairs *Conservation for the People with the People: A Review of the People and Parks Programme* (2010) 37; Department of Environmental Affairs *Status of Land Claims in Protected* Areas (2010) Unpublished document, dated February 2010.

[2] The Makuleke community lodged the land claim to the Pafuri Region of the Kruger National Park. This case study will therefore be referred to as the Makuleke case study.

[3] The Bhangazi (sometimes referred to as the Mbangweni) community lodged the land claim to the Eastern Shores Region of Lake St Lucia situated in the Isimangaliso Wetland Park. This case study will therefore be referred to as the Bhangazi case study.

economists working in each of the four CCAs in the past two decades. It effectively provides the context for the subsequent chapter in which I critically analyse the extent to which the case studies reflect general adherence to the essential elements theoretically underlying successful CCAs.[4]

2. THE CASE STUDIES

A range of perspectives informed the selection of the four case studies. From a geographical perspective, these case studies are scattered across South Africa and therefore reflect areas subject to varying political, social, economic and cultural realities. From a governance perspective, these case studies represent a range of forms of protected areas; planning frameworks; land tenure schemes; institutional and decision-making structures; management regimes; access, use and benefit-sharing schemes; and financing and support options. From a temporal perspective, these case studies represent CCAs established[5] both prior to and post South Africa's contemporary land reform regime. The case studies do not represent CCAs established under South Africa's post-2005 conservation regime.[6] The reason for this is threefold: first, only a few CCAs have been established since the commencement of this regime; secondly, it was not possible to obtain access to the full suite of legal documents underlying the formation of these areas from relevant government authorities; and thirdly, available and reliable information on the functioning of these recent CCAs is absent owing to their contemporary nature. This renders any critical and comparative commentary on them very difficult and rather premature.

The four selected case studies are the best documented in South Africa and have shaped the country's contemporary legal framework governing the settlement of communal land restitution claims in protected areas. The four case studies are also

[4] For a detailed discussion of these elements, see: Chapter 3 (Part 4).
[5] I use the term 'established' in a rather broad sense throughout the remainder of this dissertation to refer to: the establishment of a CCA *ab initio* (such as the Richtersveld case study); and the conversion of existing state-managed protected areas to CCAs (such as the Makuleke case study; the Dwesa-Cwebe case study; and the Bhangazi case study).
[6] All the case studies were settled prior to the commencement of this regime.

currently regulated under the contemporary land reform and conservation regime. Therefore, the absence of a case study emanating from the post-2005 conservation era would not appear to render the lessons provided by a critical analysis of the selected case studies not valuable and irrelevant.

2.1 RICHTERSVELD CASE STUDY

The Richtersveld National Park (RNP), situated in the north-western corner of South Africa, was established in 1991. It is 162 445 hectares in extent and is home to unique arid mountain and desert landscapes and the succulent Karoo biome which is endemic to the area.[7] The RNP is bounded in the north and east by the Orange River, South Africa's boundary with Namibia; and in the south by the Richtersveld Community Conservancy.[8] In 2003, the RNP was amalgamated with the /Ai-!Ais and Fish River Canyon Park to form the /Ai-!Ais-Richtersveld Transfrontier Park. In 2007, it was included as a buffer zone to the Richtersveld Cultural and Botanical Landscape, South Africa's eighth World Heritage Site.[9]

The pastoral-nomadic Richtersveld community has for approximately 2000 years occupied the land falling within the RNP.[10] The land formerly constituted the

[7] For a detailed description of the location, topography, geology, climate, vegetation and wildlife situated in the RNP, see: South African National Parks *Richtersveld National Park Management and Development Plan* (Undated) 4-19.

[8] The Richtersveld Community Conservancy was established in 2004 with its Management Committee situated in Eksteenfontein. There is no generally applicable national legislation governing the establishment of conservancies in South Africa. They effectively amount to contractual agreements between adjoining landowners to cooperatively manage an area in the interests of conservation. Provincial nature conservation authorities have afforded them limited recognition by allowing for their registration. The Richtersveld Community Conservancy has subsequently been declared a world heritage site (Richtersveld Cultural and Botanical Landscape). For further information on the Richtersveld Community Conservancy see: http://www.richtersveld-conservancy.org/.

[9] The area was proclaimed as such under the World Heritage Convention Act (49 of 1999) (GN 563 *GG* No. 30043 dated 4 July 2007). The provincial MEC for Sports, Arts and Culture in the Northern Cape is the duly appointed management authority (GN 739 *GG* No. 31220 dated 11 July 2008).

[10] For a detailed overview of the history of the area and the RNP, see: Odendaal F & Suich H *Richtersveld: The Land and its People* (2007) Struik Cape Town; Hendricks H, Bond W, Midgley J & Novellie P "Biodiversity Conservation and Pastoralism - Reducing Herd Size in a Communal Livestock Production System in Richtersveld National Park" (2007) 70 *Journal of Arid Environments* 719; Everingham M & Jannecke C "Land Restitution and Democratic Citizenship in South Africa" (2006) 32(3) *Journal of Southern African Studies* 557; and Magome H & Murombedzi J "Sharing South African National Parks: Community Land and Conservation in a Democratic South Africa" in Adams W & Mulligan

Richtersveld 'coloured reserve', in which the Richtersveld community was allowed to continue to reside following the introduction of Apartheid in South Africa.[11] At the time the conservation authorities sought to establish RNP, the land was formally held in trust by the erstwhile Minister of Land Affairs on the Richtersveld community's behalf.[12]

The process leading to the establishment of the RNP was drawn out and fraught with conflict.[13] In 1975, the National Parks Board (NPB)[14] initiated negotiations with relevant national, provincial and municipal authorities.[15] They concluded an agreement in 1988 in terms of which the land would be contracted to the NPB to administer in the interests of conservation. One of the key government authorities party to these initial negotiations was the former Minister of Minerals and Energy owing to the existence of prospecting and mining operations in the proposed park. The Minister agreed to the formation of the RNP on condition that the existing prospecting and mining rights would be unaffected by

M (eds) *Decolonizing Nature: Strategies for Conservation in a Post-colonial Era* (2003) Earthscan London 112.

[11] 'Coloured reserves' were declared under the Coloured Persons Communal Reserves Act (3 of 1961); read together with the Preservation of Coloured Areas Act (31 of 1961) and Rural Coloured Areas Act (24 of 1963). For an account of the Richtersveld coloured reserve and the land tenure systems operating in the area, see: May H & Lahiff E "Land Reform in Namaqualand, 1994-2005: A Review" (2007) 70 *Journal of Arid Environments* 782-798; Boonzaier E "Local Responses to Conservation in the Richtersveld National Park, South Africa" (1996) 5 *Biodiversity & Conservation* 308; and Boonzaier E "Negotiating the Development of Tourism in the Richtersveld, South Africa" in Price M (ed) *People and Tourism in Fragile Environments* (1996) John Wiley & Sons Limited Chichester 123-126.

[12] The laws providing for the formation of 'coloured reserves' were repealed by the Abolition of Racially Based Land Measures Act (108 0f 1991). Following their repeal, the land was, in terms of the Rural Areas Act (9 of 1987), held in trust for the community by the erstwhile Minister of Local Government and Agricultural in the House of Representatives. Title to the land was subsequently transferred to the Richtersveld Sida!Hub Communal Property Association in 2002, in terms of the Transformation of Certain Rural Areas Act (94 of 1998).

[13] For a comprehensive discussion of this process, see: Robinson R "Community Partnership in the Richtersveld National Park" (1998) Unpublished paper presented at Scandinavian Seminar College Workshop on African Experiences of Policies and Practices Supporting Sustainable Development, Abidjan, November 1998, 4-8; Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 126-131; Glavovic B "Resolving People-Park Conflicts Through Negotiation: Reflections on the Richtersveld Experience" (1996) 39(4) *Journal of Environmental Planning & Management* 488-495; and Boonzaier (1996) *Biodiversity & Conservation* 307-314.

[14] The National Parks Board was the forerunner to SANParks. Its powers and functions were regulated by the National Parks Act (57 of 1976).

[15] For a description of the steps taken by the NPB to establish the RNP between 1975 and 1988, see: Robinson "Community Partnership in the Richtersveld National Park" (1998) 4-5.

the creation of the RNP and that future rights could be considered on a case-by-case basis.[16]

The Richtersveld community, deeply aggrieved that they - the apparent owners of the land - had not been consulted during these discussions, lodged interdict proceedings in the Cape High Court in 1989.[17] The community asserted that they were the rightful owners of the land and should accordingly have been party to the negotiations regarding the Park's establishment. With litigation pending, the NPB was compelled to renegotiate the terms of the agreement with the Richtersveld community.[18] Having successfully asserted their title over the land, the Richtersveld community managed to significantly alter the terms of the original agreement in their favour.[19] The final *Contract Park Agreement*[20] providing for the established of the RNP was concluded in 1991.[21] The RNP constituted the first protected area in South Africa to include communally-owned land within its borders with its establishment preceding the introduction of South Africa's contemporary land reform and conservation regimes.

[16] This consultation and agreement took place in terms of section 2B(1)(a) of the then applicable *National Parks Act* (57 of 1976).
[17] Filed in the High Court (Cape Provincial Division) under Case No. 3024/89.
[18] For a description of this negotiation process see: Glavovic (1996) *Journal of Environmental Planning & Management* 491-494.
[19] The concessions included: the granting of grazing rights within the borders of the RNP; the reduction of the original size of the RNP from approximately 250 000 to 160 000 hectares, thereby securing additional grazing land for the community; the reduction in the duration of the agreement from 99 years to 24 years; the shifting of management from SANParks to a Management Planning Committee comprising of representatives from the community and conservation authorities; the payment of an annual sum of R80 000 by the NPB into a community trust to be used for local development; and provision for the renegotiation of the annual rental every 5 years. See further: Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 112-113; Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 127-129; Glavovic "Resolving People-Park Conflicts Through Negotiation" (1996) *Journal of Environmental Planning & Management* 494; and Boonzaier E "People, Parks and Politics' in Ramphele M, McDowelland C & Cock J (eds) *Restoring the Land: Environment and Change in Post-Apartheid South Africa* (1992) Pathos London 162.
[20] National Parks Board, Minister of Environmental Affairs, Minister of Local Government and Agricultural in the House of Representatives & Mr De Wet, *Richtersveld National Park Agreement*, dated 20 July 1991 (*Contract Park Agreement*).
[21] It must be noted that while the Richtersveld community successfully secured the restitution of 85 000 hectares of land (situated on the West Coast between the mouth of the Orange River to Port Nolloth) in 2003 in terms of the Restitution of Land Rights Act (the claim was finally settled in *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC)), this portion of land falls outside the boundaries of the RNP and is accordingly not directly relevant to this enquiry. For further information on the resolution of this claim see: May et al (2007) *Journal of Arid Environments* 782-798.

In terms of the *Contract Park Agreement*, the Richtersveld community contracted 162 445 hectares of their land into the RNP.[22] In return, an annual rental of some R80 000[23] is paid to the Richtersveld Community Trust (RCT).[24] The RCT, established in 1993, is responsible for administering these funds for the purpose of 'liefdadigheids' and 'opvoedkundige van 'n openbare aard'.[25] The *Contract Park Agreement* also provided for the establishment of a Management Planning Committee (MPC)[26] whose primary function it was to draw up a management plan for the RNP.[27] The MPC theoretically exercises authority over the management of, and land-use undertaken within, the RNP.[28] In reality, however, the day-to-day management of the RNP falls to South African National Parks (SANParks), the successor to the NPB.[29] SANParks is legally responsible for all operational costs associated with managing the RNP and must manage it in accordance with the Park's management plan.[30] It took ten years however to finalise this plan.[31] The resultant *Management and Development Plan*[32] sets out the vision for the RNP; contains a range of management objectives, programmes and a conservation development framework; and details the composition, powers and

[22] Clause 1.1 & clause 2. The *Contract Park Agreement* (1991) was concluded in terms of section 2B(1)(b) of the National Parks Act, which provided that a private landowner could agree to have its land incorporated within a national park by agreement with the National Parks Board.
[23] Clause 5.2. This sum, subject to a five-year inflationary increase, was initially quantified at R 0.5/hectare and is mandated for use for community development projects. The quantum of this income is not linked to management expenses or profits accrued from eco-tourism ventures undertaken in the RNP.
[24] Clause 12. The *Contract Park Agreement* (1991) provides for the creation of the Richtersveld Community Trust. The draft Trust Deed was attached to the agreement (annexure "C").
[25] Clause 4 (Richtersveld Community *Trust Deed*, dated 20 July 1991). The initial trustees were identified as the NPB and the Minister of Local Government and Agriculture in the House of Representatives (acting as trustee of the land for the community under the *Rural Areas Act*). Three community members were subsequently elected as trustees following the communities discontent that they had no representation on the Trust (Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 130.
[26] Clause 4. The MPC comprises of nine members: four SANParks officials; four elected community members from the villages of Sandrif, Kuboes, Lekkersing and Eksteensfontein; and one community member representing pastoralists. The community representatives are elected on a bi-annual basis.
[27] Clause 4.
[28] Clause 5.
[29] Grossman D & Holden P "Towards Transformation: Contract Parks in South Africa" in Suich H, Child B & Spenceley A (eds) *Evolution and Innovation in Wildlife Conservation* (2009) Earthscan London 359-360.
[30] Clause 5.
[31] The Management Plan for the RNP was eventually finalized in 2002 (SANParks *Richtersveld National Park Management and Development Plan* (undated).
[32] *Richtersveld National Park Management and Development Plan* (undated). See generally: Grossman et al "Towards Transformation: Contract Parks in South Africa" in Suich et al *Evolution and Innovation in Wildlife Conservation* (2009) 360.

functions of the Joint Management Committee (which replaced the MPC in form but not composition in 2002).

Regarding occupation and use rights, the *Contract Park Agreement* allows the community to continue to reside, graze a total of 6600 livestock and harvest natural resources situated in the RNP.[33] Further benefits accruing to the Richtersveld community include: an undertaking by the NPB to employ community members where jobs become available;[34] the establishment of a succulent nursery by the NPB within the RNP, with any sale proceeds accruing to the Richtersveld Community Trust;[35] and the Government making available three state-owned farms to the Richtersveld Community with an associated undertaking to assist the community to develop these farms for stock farming.[36] The *Contract Park Agreement* does not provide any guidance on the community's commercial development rights within the RNP or the sharing of benefits derived from the exercise of such rights. Rights of this nature were eventually detailed in the Park's *Management and Development Plan.* Current tourism infrastructure is very limited but will be expanded in the near future to include a 28-bed rest camp and two wilderness camps.[37] As it currently stands, the only substantial income accruing to the community is the annual rental that the Government pays to it.

The *Contract Park Agreement* has an initial duration of 24 years, following which it can be terminated on six years notice by either party.[38] Predominantly as a result of their frustrations regarding the limited role they currently play on the Joint Management Committee and the few benefits which have accrued to the community since the establishment of the RNP over twenty years ago, the community gave notice in 2006 of its intentions to withdraw from the *Contract Park Agreement* unless it is renegotiated on more favourable terms for the community.[39]

[33] Clause 4.
[34] Clause 5.
[35] Clause 5.3.
[36] This amounted to approximately 66 000 hectares. The Government assistance comprised of the installation of boreholes to water the stock and the erection of fencing.
[37] Ibid 32.
[38] Clause 1.
[39] Grossman et al "Towards Transformation: Contract Parks in South Africa" in Suich et al *Evolution and*

2.2 MAKULEKE CASE STUDY

The Kruger National Park (KNP), situated in the north-eastern corner of South Africa, is approximately 2 million hectares in extent. It is the country's largest, premier and economically lucrative national park. The KNP was established in 1926[40] and comprises of predominantly government-owned land.[41] It is bounded on the west by several private nature reserves.[42] These nature reserves de facto form part of the KNP as the fences between them and the Park have been removed. The KNP also forms part of the Great Limpopo Transfrontier Park that straddles the South African border and includes the Limpopo National Park (Mozambique) and the Gonarezho National Park (Zimbabwe).[43] The majority of the KNP is managed by SANParks.[44]

In 1995, the Makuleke community lodged a land claim under the Restitution of Land Rights Act[45] in respect of the northern Pafuri Region of the KNP.[46] This region is of key

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Innovation in Wildlife Conservation (2009) 361. For further information on the reasons for the anticipated withdraw, see: Turner S, Collins S & Baumgart J *Community-Based Natural Resource Management: Experiences and Lessons in Linking Communities to Sustainable Resource Use in Different Social, Economic and Ecological Conditions in South Africa* (2002) Research Report No.11, PLAAS Bellville 45; and Kepe T, Wynberg R & Ellis W "Land Reform and Biodiversity Conservation in South Africa: Complementary or in Conflict" (2005) 1 *International Journal of Biodiversity Science & Management* 13.

[40] The KNP was formally proclaimed under the National Parks Act (56 of 1926) when two previously proclaimed game reserves, the Sabie Game Reserve and the Shingwedzi Game Reserve, were consolidated into one national park.

[41] For a comprehensive discussion of the history of the KNP, see: Carruthers J *The Kruger National Park: A Social and Political History* (1995) University of Natal Press Pietermaritzburg.

[42] These private and communally-owned nature reserves include: Umbabat Private Nature Reserve; Klaserie Private Game Reserve; Timbavati Private Game Reserve; Manyeleti Game Reserve; and Sabi Sand Game Reserve. These nature reserves are managed by the landowners themselves and/or privately appointed and funded conservation agencies.

[43] The Great Limpopo Transfrontier Park is regulated in terms of a *Memorandum of Understanding* entered into between South Africa, Mozambique and Zimbabwe in November 2001. For further information on this initiative, see: http://www.peaceparks.org/. For a discussion on the process leading up to its establishment, see: Whande W & Suich H "Transfrontier Conservation Initiatives in Southern Africa: Observations from Great Limpopo Transfrontier Conservation Area" in Suich et al *Evolution and Innovation in Wildlife Conservation* (2009) 375-391; Spierenburg M, Steenkamp C & Wels H "Enclosing the Local for the Global Commons: Community Land Rights in the Great Limpopo Transfrontier Conservation Area" (2008) 6(1) *Conservation & Society* 89-90; and Whande W *Trans-boundary Natural Resource Management in Southern Africa: Local Historical and Livelihood Realities within the Great Limpopo Trans-frontier Conservation Area* (2007) Research Report No.25, PLAAS Bellville, 14-47.

[44] Those areas not exclusively managed by SANParks are: the privately-owned nature reserves situated on its western border which are managed by the landowners themselves and/or privately appointed and funded conservation agencies; and the Pafuri Region which is theoretically co-managed by SANParks and the Makuleke Community.

[45] Act 22 of 1994.

importance to the KNP as it holds 75 % of the Park's biodiversity and is also at the heart of the transfrontier park initiative.[47] The claim, one of approximately forty such claims lodged in respect of the KNP,[48] was resolved in 1998 by way of agreement.[49] In terms of the *Settlement Agreement*, ownership of some 19 000 hectares situated in the Pafuri Region was restored to the community.[50] The land was formally transferred to the Makuleke Communal Property Association (MCPA)[51] subject to the following conditions: no mining or prospecting may be undertaken on the land; no part of the land may be

[46] For a detailed discussion of the history of the area, the land claim and the settlement process, see: Robins S & Van Der Waal K "'Model Tribes' and Iconic Conservationists? - Tracking the Makuleke Restitution Case in Kruger National Park" in Walker C, Bohlin A, Hall R & Kepe T *Land, Memory, Reconstruction and Justice - Perspectives on Land Claims in South Africa* (2010) Ohio University Press Ohio 163-180; Amend T, Ruth P, Eissing S & Amend S *Land Rights Are Human Rights: Win-Win Strategies in Sustainable Nature Conservation - Contributions from South Africa* (2008) Sustainability Has Many Faces No.4, GTZ Eschborn 19-24; De Villiers B *Land Claims and National Parks: The Makuleke Experience* (1998) HSRC Press Pretoria 45-57; Friedman J "Winning Isn't Everything: What the Makuleke Lost in the Process of Land Restitution" (2005) BA Thesis (Environmental Studies) University of Chicago 5-28; Ramutsindela M "The Perfect Way to Ending a Painful Past? Makuleke Land Deal in South Africa" (2002) 33 *GeoForum* 16-22; and Steenkamp C & Uhr J *The Makuleke Land Claim: Power Relations and Community-Based Natural Resource Management* (2000) Evaluating Eden Series Discussion Paper No.18, IIED London 11-20.

[47] Steenkamp et al *The Makuleke Land Claim* (2000) 2.

[48] With the exception of the Makuleke claim, all remaining claims in the KNP remaining outstanding, with a moratorium having been placed on land restoration as an option for the settlement of these claims (Government Communication Information System "State Announces Decision on Kruger National Park Land Claims" Joint Statement issued by the Department of Environmental Affairs and Tourism and Department of Land Affairs, dated 28 January 2009).

[49] SANParks, Makuleke Community; Minister of Environmental Affairs and Tourism; Minister of Public Works; Minister of Land Affairs; Minister of Minerals and Energy; Minister of Agriculture; Minister of Defence & Member of the Executive Council for Agriculture, Land and Environment (Northern Province) *Main Agreement Relating to the Makuleke Land Claim*, dated 30 May 1998 (*Settlement Agreement*). The *Settlement Agreement* (1998) contains three main chapters. Chapter 1 deals with the restoration of land rights. Chapter 2 deals with the incorporation of land into the Kruger National Park and sets out the parties' respective rights and obligations relating to this land. Chapter 3 contains a range of standard contract terms.

[50] This process involved the formal deproclamation of the Pafuri Region as a Schedule 1 National Park (in terms of section 2(3) of the National Parks Act); the transfer of the land to the CPA in terms of a Deed of Grant; and the re-incorporation of the land into the KNP (in terms of an agreement concluded under section 2B(1)(b) of the National Parks Act). The erstwhile Minister of Land Affairs agreed to waive all transfer and stamp duties associated with the transfer of land to the CPA (clause 18).

[51] The MCPA was established in terms of the Communal Property Association Act (28 of 1996) and its objects, membership, powers, functions and governance structure are detailed in its Constitution. The current chairperson of the CPA is Chief Makuleke, who similarly chairs the relevant tribal authority. There are currently 15 000 members of the MCPA, which comprise of persons previously disposed of land in 1969, their descendants and residents of the Ntlhaveni area to which the Makuleke were relocated. The MCPA is headed by a nine-member executive council, employs two full-time staff members, is organised into sub-committees and has established three district development forums to facilitate communication and consultation between the MCPA and its membership. For more information on the governance structure of the MCPA, see: De Villiers B & Van den Berg M *Land Reform: Trailblazers: Seven Successful Case Studies* (2006) KAS Johannesburg 16-17; De Villiers B *People and Parks - Sharing the Benefits* (2008) KAS Johannesburg 74.

used for residential purposes other than that required for ecotourism purposes; no part of the land may be used for agriculture; the land must be used and maintained solely for the purpose of conservation and associated commercial activities; no development may take place on the land prior to an environmental assessment being considered and approved by the competent authority; and SANParks has a pre-emptive right to purchase the land should the MCPA wish to sell it.[52] The community agreed to have these conditions registered against the Deed of Grant thereby ensuring their perpetuity.[53] Underpinning the entire agreement is a commitment by the parties of mutual support.[54]

In terms of the *Settlement Agreement*, the MCPA agreed to contract the Pafuri Region back to SANParks for a period of 50 years.[55] The duration of this arrangement is flexible however. The MCPA or SANParks may, on five years notice, terminate the arrangement after 20 years.[56] Should this occur, the Pafuri Region would be excluded from the KNP.[57] The MCPA and SANParks may also by agreement, at least two years prior to the termination of the initial 50-year period, extend the duration of this arrangement for a further period of fifty years.[58]

For the duration of the above arrangement, the land contracted into the KNP is theoretically managed by a Joint Management Board (JMB) comprising of three members from each of the MCPA and SANParks.[59] Each entity is responsible for covering the participation costs of its members on the JMB.[60] Additional members from each of these institutions may participate in the meetings of the JMB in an advisory

[52] Clauses 11 and 12.
[53] Clause 11(2) and clause 22, read with Schedule 3.
[54] Article 48.
[55] Clause 24(1).
[56] Clause 24(1).
[57] Clause 23(1)(2) read with clause 24(1) and clause 40. Such an event would not appear to impact on the conditions registered against the Deed of Grant in terms of the *Settlement Agreement* (1998) and SANParks may elect to serve in an advisory capacity to the MPCA regarding the future use of the land.
[58] Clause 24(2).
[59] For a discussion on the functioning of the JMB, see: De Villiers et al *Land Reform: Trailblazers* (2006) 18-20.
[60] Clause 25(18).

capacity.[61] Decision-making is generally by way of consensus,[62] with provision being made for a range of deadlock breaking mechanisms.[63] A streamlined joint management committee, comprising of two representatives from each constituency, has also been set up to facilitate more frequent interaction.[64] Express recognition is made in the *Settlement Agreement* of the need to provide employment opportunities and to transfer skills to the community.[65] The tangible realisation of these opportunities has been very limited to date.[66]

The function of the JMB is to undertake the 'day-to-day management and operations' and regulate 'all conservation management related activities undertaken within' the Pafuri Region of the KNP.[67] In doing so, the JMB is compelled to comply with the terms laid out in the *Settlement Agreement*, the relevant statutory framework, its own resolutions and decisions, and the *Master Plan*[68] it developed in 2000.[69] The *Settlement Agreement* mandates SANParks to 'do all such things which are necessary for or incidental to or connected with the day-to-day conservation management of the business and affairs' of the Pafuri Region, without however, detracting from the powers of the JMB.[70] This creates some ambiguity regarding who is in fact responsible for the day-to-day management of the Pafuri Region. SANParks appears to retain its overall management responsibilities in the Pafuri Region but operates in the capacity as the agent of the JMB.[71] However, the JMB has no authority over the budget for the area and is therefore largely toothless.

[61] Clause 25(14).
[62] Clauses 25.
[63] Clause 38.
[64] Turner et al *Community-Based Natural Resource Management* (2002) 46.
[65] Clause 29 and clause 30 respectively.
[66] For a summary of the limited skills transfer programmes and employment opportunities provided in the Pafuri Region, see: De Villiers *People and Parks - Sharing the Benefits* (2008) 80-81.
[67] Clause 26(2) read with clause 27(3).
[68] Joint Management Board, *Master Plan for the Conservation and Sustainable Development of the Makuleke Region Kruger National Park* (2000) First Edition, Undated (*Master Plan*). The *Master Plan* provides: a historic overview and social background to the area; a general description of the area (location, climate, geology; hydrology; soils; biology, landscape types; infrastructure); a vision for the area; and a series of principles and objectives to guide the management of, and development within, the area. Provision is made for the amendment of the *Master Plan* where necessary (clause 27(2)).
[69] Clause 26(1).
[70] Clause 28.
[71] De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 63.

In respect of commercial activities undertaken in the Pafuri Region, the MCPA theoretically retains exclusive authority.[72] There are, however, several proviso's attached to this exclusivity: it must consult SANParks prior to undertaking or authorising such activities[73] or granting tenders to developers/operators;[74] such activities must comply with the principles set out in the *Master Plan*;[75] and such activities must be preceded by an environmental impact assessment approved by the competent authority.[76] The expectation of significant employment opportunities and financial return offered by eco-tourism was one of the principal reasons for the community agreeing to contract the land back to the KNP.[77] Some commentators warned of the somewhat inflated nature of these expectations given several challenges to developing eco-tourism in the area.[78] Notwithstanding these challenges, the MCPA have successfully concluded three commercial concessions in the area: an annually renewable hunting concession with Wayne Wagner Safaris;[79] and two luxury accommodation concessions with Matswana Safaris (Pty) Ltd[80] and Wilderness Safaris (Pty) Ltd.[81] The proceeds

[72] Clause 27(3) and clause 27(4).
[73] Clause 27(5).
[74] Clause 32(2).
[75] Clause 31(2)(1)-(2). SANParks representatives on the JMB are afforded a right to: determine that any proposed commercial activities comply with the *Master Plan* (undated) (clause 31(3)(1)); participate in the EIA process (clause 31(3)(2)); and ensure that the tender processes are fair (clause 31(3)(4)).
[76] Clause 31(2)(7).
[77] De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 65.
[78] De Villiers et al *Land Reform: Trailblazers* (2006) 22; and De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 65. These challenges include: the area's extremely hot climate; the prevalence of malaria; the low rate of game spotting in the area; underdeveloped tourism infrastructure; and the area's isolated location.
[79] For further information on the nature of the hunting concession, see: Spenceley A *Tourism Investment in the Great Limpopo Transfrontier Conservation Area: Scoping Report* (2005) 15-16.
[80] Matswana Safari's was awarded a 45-year concession to build and operate The Outpost, a 36 bed lodge. In terms of the concession agreement, 10 % of the lodge's gross turnover is paid to the Makuleke Community Development Trust. At the end of the concession agreement, which is reviewable after 15 years, ownership of the lodge reverts to the MCPA. The lodge is currently staffed by members from the Makuleke community. This concession was sold to another operator in 2008. For more information on the lodge, see: www.theoutpost.co.za.
[81] Wilderness Safaris was awarded a concession to build and operate an 18 bed lodge and a 44 bed luxury lodge in the Pafuri Area (phase 1), with the option to build a further 18 bed lodge in the future (phase 2). To date, it has built the Pafuri Camp, a luxury 20-bed Camp and operates the Pafuri Walking Trail. An upfront sum of R150 000 was paid for the concession, with an additional 8 % of Wilderness Safari's gross profit generated in the Pafuri Region paid to the Makuleke Community Development Trust. In terms of the concession agreement, the MCPA agreed not to grant any further concessions in the Pafuri Region, unless Wilderness Safaris failed to undertake phase 2 of its proposed development. Wilderness Safaris agreed to undertake certain rather trivial community development projects: the supply

generated from these concessions are paid to the Makuleke Community Development Trust.[82]

The community have the following additional rights in respect of the Pafuri Region, namely: access; the establishment of a research facility, museum and royal kraal for future tourist, religious and cultural activities; and the use of the natural resources situated in the Pafuri Region.[83] The scope of these rights is, however, generally determined by the JMB and subject to the *Master Plan*.[84]

All income generated from permissible commercial activities in the Pafuri Region, excluding gate fees, accrue to the MCPA.[85] For an initial period of five years, SANParks bore all operational management costs. The MCPA is currently liable for 50 % of these costs provided that such an amount does not exceed 50 % of the MCPA's net profit derived from permissible commercial activities undertaken within the Pafuri Region.[86] The MCPA is liable for all costs relating to the establishment and maintenance of infrastructure associated with these commercial activities.[87]

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of computers and sports equipment to the school; and the provision of ten bursaries (with a total value of R20 000 per annum) to students wishing to undertake further studies in the area of eco-tourism. The concession runs for an initial period of 15 years, renewable for a further period of 15 years. At the end of the concession agreement, ownership of the lodge reverts to the MCPA. For more information on these initiatives, see: www.pafuri.com.

[82] This entity was created to hold the proceeds generated by the concession agreements and grants, on behalf of the MCPA. Seven trustees, four from within the community and three from outside the community, administer the Trust. For more information on Trust's management structure, see: Collins S "The Makuleke Conservation and Land Reform Project - A Conservation Rather than Community Development Success So Far" Unpublished paper dated April 2010, 12-13; and Thornhill C & Mello D "Community-Based Natural Resource Management: A Case Study of the Makuleke Community" (2007) 42(3) *Journal of Public Administration* 294-295. For a summary of the proceeds generated from the concession agreements between 2005-2009, see: Collins "The Makuleke Conservation and Land Reform Project" (2010) 9; Spierenburg M, Wels H, van der Waal K & Robins S "Transfrontier Tourism and Relations Between Local Communities and the Private Sector in the Great Limpopo Transfrontier Park" in Hottola P (ed) *Tourism Strategies and Local Responses in Southern Africa* (2009) CAB International Cambridge 174-176; and Spenceley *Tourism Investment in the Great Limpopo Transfrontier Conservation Area* (2005) 15-17.

[83] Clause 33.

[84] Ibid.

[85] Clause 34(1). The gate fees accrue to SANParks but provision is made in the agreement for this aspect to be renegotiated at any time (clause 34(2)).

[86] Clause 34(3).

[87] Clause 34(5).

In addition to the land situated in Pafuri Region of the KNP, the MCPA were also granted title to land situated in two adjacent conservation areas, the Matshakatini Nature Reserve and the Makuya Park Game Reserve.[88] Whilst these areas were not formally incorporated within the KNP and therefore subject to the *Contract Park Agreement*, the community agreed to the remove the fences between these areas and the Pafuri Region, and for them to be managed as an open ecological system.[89]

2.3 DWESA-CWEBE CASE STUDY

The Dwesa and Cwebe Nature Reserves, which largely comprise of indigenous coastal forests and grasslands, are jointly 5278 hectares in extent and situated adjacent to one another on the east coast of South Africa.[90] Their history is turmoiled and complex and has been comprehensively canvassed by several scholars.[91] In summary, the Reserves initially comprised of two demarcated forest reserves declared in the 1890s.[92] Local resident communities were forcibly removed over a period of approximately 50 years

[88] Clauses 6 and 9.

[89] Clause 16-17. These areas officially fall outside the bounds of the Pafuri Region and accordingly the ambit of this dissertation. For further information on the status of the restoration of this land, and the challenges that have plagued it, see: Whande W "Windows of Opportunity or Exclusion? Local Communities in the Great Limpopo Transfrontier Conservation Areas, South Africa" in Nelson F (ed) *Community Rights, Conservation and Contested Land - The Politics of Natural Resource Governance in Africa* (2010) Earthscan London 147-173.

[90] For a comprehensive description of the location, topography, geology, climate, vegetation and wildlife situated in the reserves see: Eastern Cape Parks Board *Draft Integrated Reserve Management Plan: Strategic Management Plan: Dwesa-Cwebe Nature Reserve* (dated 6 December 2006) 9-16; and Timmermans H & Naicker K "The Land" in Palmer R, Timmermans H & Fay D (eds) *From Conflict to Negotiation - Nature-Based Development on South Africa's Wild Coast* (2002) HSRC Press Pretoria 2-14.

[91] See generally: Palmer R, Kingwill R, Coleman M & Hamer N *The Dwesa-Cwebe Restitution Claim: A Case Study as Preparation for a Field Based Learning Programme* (2006) Phuhlisani Solutions CC Cape Town; Palmer R *From Title to Entitlement: The Struggle Continues at Dwesa-Cwebe* (2003) Fort Hare Institute of Social and Economic Research Working Paper No. 46, University of For Hare Alice; Palmer et al *From Conflict to Negotiation* (2002); Fay D & Palmer R "Prospects for the Redistribution of Wealth Through Land Reform in Dwesa-Cwebe" Cousins B (ed) *At the Crossroads: Land and Agrarian Reform into the 21st Century* (2000) PLAAS/NLC Bellville/Braamfontein 194-210; Palmer R & Timmermans H (eds) *Indigenous Knowledge, Conservation Reform, Natural Resource Management and Rural Development in the Dwesa and Cwebe Nature Reserves and Neighbouring Village Settlements* (1997) Report, Institute of Social and Economic Research, Rhodes University Grahamstown; and Kepe T "Communities, Entitlements and Nature Reserves: The Case of the Wild Coast" (1997) *South Africa IDS Bulletin No. 28*, 47-58.

[92] In terms of the Forests Act (1888), all indigenous forests over five hectares were vested in the Government and while not formally proclaimed as a protected area, the adjacent Dwesa and Cwebe coastal forests were regarded as forest reserves.

but were initially granted servitudes to access and extract various natural resources in the Reserves.[93]

Following the creation of 'independent homelands' (effectively native reserves) in South Africa in the 1970's, the demarcated forest reserves were in 1975 formally proclaimed as the Dwesa and Cwebe Nature Reserves under the Transkei Nature Conservation Act.[94] While legally constituting two reserves, they have practically been managed as a single reserve since then and shall accordingly be referred to jointly as the Dwesa-Cwebe Nature Reserve (DCNR) for the remainder of this dissertation. Portions of the DCNR were fenced off and residents living adjacent to it were precluded access.[95] In 1992, the Dwesa-Cwebe Marine Protected Area was proclaimed adjacent to the DCNR, thereby precluding community access to the coastal resources situated on its seaward boundary.[96] In 1994, following the reincorporation of the homelands into South Africa, the DCNR retained its status and name as the Dwesa-Cwebe Nature Reserve.[97] It however simultaneously regained its status as a demarcated state forest[98] and the responsibility for managing it was transferred from the erstwhile Department of Water Affairs and Forestry (DWAF) to the Eastern Cape Department of Economic Affairs, Environment and Tourism (DEAET).[99] No formal agreement was however ever concluded between these authorities regulating the transfer of such authority.[100]

[93] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 27. See further: Fay D, Timmermans H & Naicker R "Closing the Forests - Segregation, Exclusion and their Consequences from 1936 to 1994" in Palmer et al *From Conflict to Negotiation* (2002) 78-110.

[94] Act 6 of 1971. The management of the reserves was transferred to the Transkei Nature Conservation Department and they strangely simultaneously retained their status as demarcated forest reserves. In 1992, they were renamed as national wildlife reserves under the Transkei Environmental Conservation Decree (9 of 1992) in 1992. See generally: Eastern Cape Parks Board *Draft Integrated Reserve Management Plan: Strategic Management Plan: Dwesa-Cwebe Nature Reserve*, dated 6 December 2006, 8.

[95] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 25.

[96] The marine protected area was initially proclaimed under the Transkei Environmental Conservation Decree (9 of 1992) and thereafter reconstituted in 2000 under the Marine Living Resources Act (18 of 1998) in GNR 1429 *GG* No. 21948 dated 29 December 2000.

[97] As proclaimed under the Transkei Nature Conservation Act (6 of 1971).

[98] Recognised and regulated under the National Forests Act (84 of 1998).

[99] *Draft Integrated Reserve Management Plan* (2006) 6. The management of the reserves was subsequently transferred to the Eastern Cape Parks Board in 2006 and then onto the Eastern Cape Parks and Tourism Agency in 2010.

[100] *Draft Integrated Reserve Management Plan* (2006) 6.

A decade of drought coupled with growing political mobilisation resulted in the community invading the DCNR in 1994.[101] The army forcibly removed the community but the invasion prompted the new democratically elected government to enter into negotiations with it.[102] This process culminated in the community lodging a land claim under the Restitution of Land Rights Act in 1996. After five years of protracted negotiations,[103] the parties concluded a *Settlement Agreement*[104] in June 2001. The complexity of stakeholders with an interest in the settlement is reflected in the broad array of parties that are signatories to it.[105] Furthermore, the complexity of the settlement is reflected in a convoluted array of additional agreements and documents that have to be read in conjunction with the main *Settlement Agreement* to make sense of it. These include the *Community Agreement*,[106] *Management Planning Framework*[107] and a draft *Business Plan.*[108]

[101] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 26-27 & 31-32.

[102] For a detailed overview of these initial negotiations and the factors that impacted on them, see: Fay D "Mutual Gains and Distributive Ideologies in South Africa: Theorizing Negotiations Between Communities and Protected Areas" (2007) 35 *Human Ecology* 87-91; and Palmer R, Fay D, Timmermans H, Lewis F & Viljoen J "Regaining the Forests - Reform and Development from 1994 to 2001" in Palmer et al *From Conflict to Negotiation* (2002) 111-143.

[103] For a detailed overview of the land negotiation and settlement process in DCNR, see: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 28-31.

[104] Dwesa-Cwebe Community Associations, Minister of Agriculture and Land Affairs, Minister of Water Affairs and Forestry, Minister of Environmental Affairs and Tourism, MEC for Economic Affairs, Environment and Tourism (Eastern Cape), Transdev (Pty) Ltd, Trustees of the Dwesa-Cwebe Land Trust and Occupiers of the Cottages on Claimed Land, *Settlement Agreement in Terms of Section 42D of the Restitution of Land Rights Act: The Dwesa-Cwebe Community Land Restitution Claim*, dated 17 June 2001 (*Settlement Agreement*).

[105] For a list of these parties, see note 104 above.

[106] Minister of Water Affairs & Forestry, MEC for Economic Affairs, Environment and Tourism (Eastern Cape) & the Trustees of the Dwesa-Cwebe Land Trust *Community Agreement*, dated 17 June 2001 (*Community Agreement*). The *Community Agreement* was concluded in terms of section 30 of the *National Forests Act* (84 of 1998) and was necessary owing to the fact that the nature reserves comprised demarcated state forests falling under the competence of the erstwhile Department of Water Affairs and Forestry (such competence having being delegated to the Department of Economic Affairs, Environment and Tourism (Eastern Cape)).

[107] *Management Planning Framework for the Dwesa-Cwebe Reserve*, unauthored and undated (*Management Planning Framework*). The *Management Planning Framework*, which was annexed to the *Settlement Agreement* (2001), purports to set out 'the framework criteria for the development of detailed and issue-focussed subsidiary management plans, which will guide and facilitate the efficient and effective management of the Reserve' (at 1). In the continued absence of such 'detailed and issue-focussed subsidiary management plans', it continues to guide the management of the DCNR.

[108] Department of Economic Affairs, Environment and Tourism (Eastern Cape) *Draft Business Plan for the Conservation Management of the Dwesa and Cwebe Nature Reserve*, dated August 2000 (draft *Business Plan*). The draft *Business Plan*, which does not appear to have been finalised, contains: a five year strategy to address the management challenges in the DCNR; a broad action plan for the DCNR; the resource requirements necessary to implement the plan; an analysis of revenue constraints and

The *Settlement Agreement* deals with three distinct assets situated in the DCNR, namely: the land; the Haven Hotel; and an array of privately owned coastal cottages. Ownership of the land was transferred to the Dwesa-Cwebe Land Trust[109] (DCLT).[110] The transfer is, however, subject to several conditions: the land must be reserved for conservation purposes in perpetuity; no part of the DCNR can be used for 'residential, agricultural or other development purposes, save for low-density nature-based tourism development as ... approved by the competent authority'; and the DCLT may not sell the land other than to the Government.[111] The *Settlement Agreement* furthermore compelled the DCLT to lease the land back to the former DWAF for a period of 21 years.[112]

The *Settlement Agreement* recognises DEAET as the formal management authority.[113] However, the *Settlement Agreement* specifically incorporates the terms of the *Community Agreement*,[114] which provides for the co-management of the DCNR by the DCLT and DEAET for a period of 21 years.[115] The nature of this co-operative

opportunities; and the anticipated role to be played by the government authorities, community and the private sector. The draft *Business Plan* is probably yet to be finalised as no formal agreement has been reached between the relevant authorities for the transfer of management authority for the DCNR to the Department of Economic Affairs, Environment and Tourism (Eastern Cape) or the Eastern Cape Parks and Tourism Agency (*Draft Integrated Reserve Management Plan* (2006) 6).

[109] For the purpose of the settlement, the 2382 claimant households were structured into seven CPAs representing the interests of the seven major villages in the area (Hobeni; Mendwane; Ntlangano; Mpume; Ngoma; Ntubeni; Cwebe). The DCLT was then created and its membership comprises of: one representative from each of the seven CPAs and seven government officials drawn from the erstwhile Department of Water Affairs and Forestry, the erstwhile Department the Land Affairs, Eastern Cape Parks Board, the Amathole District Municipality and the Mbashe Municipality. The express purpose of the DCLT is to: act on behalf of the communities; ensure the effective use of the allocated restitution funds; and form a link between the community, Mbashe Municipality, Amathole District Municipality and other institutions (*Draft Integrated Reserve Management Plan* (2006) 5).

[110] Clauses 4 and 5.

[111] Clauses 6 and 7.

[112] Clause 9.

[113] Clause 11. This function is de facto undertaken by the Eastern Cape Parks and Tourism Agency.

[114] Clause 8.

[115] Clause 4.1 read with clause 5. It is interesting to note is that the *Community Agreement* (2001) specifically records that the Minister of Water Affairs and Forestry has delegated the management of the nature reserves to DEAET in terms of section 48 of the National Forest Act (84 of 1998), while the *Draft Integrated Reserve Management Plan* (2006) specifically records the absence of any such arrangement (at 6).

arrangement is detailed in both the *Community Agreement*[116] and the *Management Planning Framework,*[117] which provide for the establishment of a Co-Management Committee (CMC) comprising of equal community and government representation. While both of these documents seek to outline the respective roles and responsibilities of all parties,[118] they fail to define the role of the CMC and its relationship to the management authority clearly. This may be the reason why, notwithstanding the establishment of the CMC in 2002, its role and function has been minimal to date.[119] The *Settlement Agreement* compels the parties to renegotiate the terms of the *Community Agreement*, and hence their co-management arrangement, within one year of its termination.[120] Should they fail to reach agreement on a revised management regime, the authority to manage the DCNR will revert solely to the relevant competent government conservation authority.[121]

The co-management of the DCNR must take place in accordance with a management plan developed by the CMC, which must in turn comply with the contents of the *Management Planning Framework.*[122] No such management plan is formally in place.[123]

[116] Clause 6.
[117] At 4.
[118] *Management Planning Framework* (undated) 3-4; and *Community Agreement* (2001) clauses 12-14. Those ascribed to DWAF include: monitor the performance of the management authority; retain the power to intervene should the management authority not perform its functions; support the management authority; and provide assistance to the management authority and the community to undertake approved projects. Those ascribed to DEAET include: manage the nature reserves; promote the principle of co-management within the nature serves; provide the financing to manage the nature reserves; and provide resource and capacity to assist the DCLT and Co-Management Committee in the exercise of their function. Those ascribed to the DCLT include: participate in planning for and managing the nature reserves; ensure community support for the relevant agreements; promote a safe and tourist friendly environment; contribute to the costs of managing the nature reserves; and accrue a share of the revenue derived from the nature reserves.
[119] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 49-50. In 2008, the Eastern Cape Parks Board expressly recognised the need to reactivate the function of the Co-Management Committee in 2009 (Eastern Cape Parks Board *Annual Report 2008/2009* (2008) 19).
[120] Clause 8(1), 8(2) and 8(4) of the *Settlement Agreement* (2001) read together with clause 5 of the *Community Agreement* (2001).
[121] Ibid.
[122] Clause 4.4. The vision of the *Management Planning Framework* (undated) is that 'owners of the land and the State will jointly manage the area in a manner that conserves the biodiversity, while seeking to provide equitable benefits to the owners of the land based on the principles of sustainable utilization' (at 1). The *Management Planning Framework* contains a range of guiding principles, sets out the administrative and management responsibilities of the parties to the *Settlement Agreement*, and provides for the creation of a co-management committee.
[123] The *Draft Integrated Reserve Management Plan* (2006) is yet to be formally approved by the CMC.

It would therefore appear that in its absence, the management of the DCNR is simply guided by the management principles prescribed in the *Management Planning Framework.*[124]

In terms of the *Settlement Agreement*, read together with the *Community Agreement*, the primary responsibility for financing the management of the DCNR falls upon the erstwhile DWAF and DEAET.[125] Furthermore, all revenue generated by the Reserve, excluding certain predefined categories of income,[126] must be held in a separate account administered by the CMC.[127] This revenue can be used to fund the operational costs associated with the DCNR, provided that where such income exceeds in any year 50 % of the operational costs for that year, such excess shall accrue to the DCLT.[128] The parties to the *Settlement Agreement* undertake to obtain the written approval of one another prior to entering into any 'private partnerships or commercial ventures' with third parties to generate revenue through the development or exploitation of resources within the DCNR.[129]

The remaining two assets falling within the DCNR are dealt with separately in the *Settlement Agreement*. Ownership of the Haven Hotel is transferred to the DCLT.[130] As provided for in the *Settlement Agreement*, the land on which it is situated has been surveyed and deproclaimed and the Hotel is currently separately owned and managed

[124] These management principles include: the community will have managed access to some natural resources situated in the nature reserves on an ecologically sustainable basis; the community will enjoy preferential status in terms of eco-tourism employment opportunities, resource rights, and input into the development of management policies and plans; tourism development will be encouraged in the reserves to ensure that the community receives appropriate financial and other benefits from them; the communities local custom, traditions and knowledge will be duly respected and used in the management of the reserves; the community will share in the costs and responsibilities associated with the management and development of the reserves on an equal basis (*Management Planning Framework* (undated) 2).
[125] *Settlement Agreement* (2001) (clause 12) and *Community Agreement* (2001) (clause 7.3).
[126] These categories of income include: revenue generated from the Haven Hotel; income derived from community levies charged for entry or undertaking recreational activities in the nature reserve; the lease and the interest thereon; the restitution, settlement and planning grants; and donor funding (clause 7.5).
[127] Clause 7.4.
[128] Ibid.
[129] Clause 12.5 and clause 12.6.
[130] Clause 14.

by the DCLT.[131] The DCLT has subsequently entered into a lease with a private operator to run the hotel on its behalf.[132] Ownership of the 39 privately-owned coastal cottages is similarly restored to the DCLT that is in turn compelled to conclude long-term leases which each of the owners.[133] These cottages are managed as if they fall within the DCNR and are accordingly subject to the jurisdiction of the CMC and the *Management Planning Framework*.[134]

In addition to the return of the land and fixed assets thereon, the DCLT received a total of R14m comprising of: R2.1m as consideration for leasing the land to the former DWAF; R1.6m as compensation under the Restitution of Land Rights Act for forgoing certain use rights in respect of the land situated in the DCNR; R7.146m in discretionary restitution grants; and R3.430m in settlement planning grants.[135] Regarding the consideration received under the lease, the *Settlement Agreement* specifically provides that it must be invested by the DCLT and the capital cannot be used for ten years unless in 'accordance with a development plan duly approved by the relevant Minister or MEC'.[136] Regarding the remaining funds, the Amatole District Municipality, and not the DCLT, was appointed as the implementing agent for the settlement and accordingly the administration of these funds was transferred to it.[137] The principal purpose for these funds is to facilitate agricultural, educational and infrastructure development projects within and adjacent to the DCNR.[138] A multi-stakeholder Project Steering Committee

[131] Clause 15 and clause 19. The Haven Bashe Hotel Executive Board, comprising of community members from the DCLT, was established to oversee the management of the Haven Hotel.
[132] Haven Bashe Hotel Executive Board & South Ambition 859 CC *Lease Agreement in Respect of Haven Hotel*, dated 7 February 2006. The lessee currently rents the Haven Hotel for a sum of approximately R10 000 per month. In addition, the lessee charges and pays over to the lessor a R10/night/person levy; and undertakes to maintain and renovate several portions of the hotel's accommodation. The lease, which originally ran for a 3.5 year period, has recently been extended for 15 years.
[133] Clauses 21-23.
[134] Clauses 24-25.
[135] Clauses 9-10.
[136] Ibid. A plan of this nature was finalised in 2003. See: *Dwesa-Cwebe Development Plan Report*, unauthored and dated August 2003. It contains the following content: a detailed background to the DCNR; a development plan which sets out the development vision for the DCNR and an array of programmes to facilitate its attainment; and the role of the DCLT and other institutions for implementing the plan.
[137] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 6. An agreement was apparently concluded between the Amathole District Municipality and the DCLT in 2009 regarding the implementation of these development grants (Eastern Cape Parks Board *Annual Report 2008/2009* (2008) 22).
[138] Clause 10.

was established in 2002 to facilitate the implementation of these projects but its role has been chequered to date.[139] As a result, the range of development projects undertaken within and adjacent to the DCNR has been very limited.[140]

The communities surrounding the DCNR have for the past ten years witnessed very little tangible benefit with the exception of limited employment opportunities, a small rental and bed levy accruing to the DTLT in terms of the Haven Hotel Lease Agreement, and small rentals accruing from the lease of the privately-owned cottages. The situation is also unlikely to improve in the future with the recent recall by the national government of the unspent settlement planning grants.[141] The situation is compounded by the fact that the DCNR currently operates at a significant loss and as stipulated in the draft *Business Plan* will probably continue to do so until private partners can be found to establish additional tourism concessions in the nature reserve.[142]

2.4 BHANGAZI CASE STUDY

The Isimangaliso Wetland Park (IWP) is situated on the north-eastern coast of South Africa. It spans some 220 km of coastline, including a 190 kilometre marine reserve, and is 358 000 hectares in extent.[143] It is an area of both great biological and cultural importance.[144] The origins of the IWP date back to 1895 when the area around Lake St

[139] The Project Steering Committee comprises of representatives from the: DCLT; Amathole District Municipality; Mbashe Local Municipality; Regional Land Claims Commissioner; ECPB (now ECP&TA); and DEAET. Its core function is to implement the *Settlement Agreement* (2001). See further: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 45-46.

[140] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 6 & 53-54.

[141] R5m of the R10.5m in discretionary restitution grants and settlement planning grants were recalled by the National Treasury in early 2010 (Unknown author *Summary Status Report: Dwesa-Cwebe Post Settlement Implementation*, dated 19 July 2010, 2).

[142] See generally the draft *Business Plan* (2000).

[143] For a detailed description of the history, location, topography, geology, climate, vegetation, wildlife and infrastructure situated in the IWP, see: Isimangaliso Wetland Park Authority *Isimangaliso Wetland Park Integrated Management Plan* (2008) 20-46.

[144] The IWP contains: three major lake systems; eight interlinking ecosystems; most of South Africa's remaining swamp forests; Africa's largest estuarine system; 526 bird species; and 25 000 year-old coastal dunes. It is furthermore home to a diverse range of species including: black rhino; oribi; wild dog; elephant; cheetah; whales and coelacanths. From a cultural perspective, there is evidence of 700 year old fishing traditions and human occupation in the Park dating back to the early stone-age. See further: *Isimangaliso Wetland Park Integrated Management Plan* (2008) 23-38.

Lucia was declared as the St Lucia Game Reserve.[145] In 1999, this Reserve was consolidated with thirteen other protected areas[146] and formally declared as the Greater St Lucia Wetlands Park under the World Heritage Convention Act.[147] The management of the Greater St Lucia Wetland Park, which includes four sites designated as Ramsar wetlands of international importance,[148] is predominantly undertaken by the Greater St Lucia Wetland Park Authority.[149] The name of the Park and the Management Authority were changed in 2007 to the Isimangaliso Wetland Park and Isimangaliso Wetland Park Authority respectively.[150] There are current proposals to incorporate the IWP within the Ponta do Ouro-Kosi Bay Transfrontier Conservation Area, which is in turn planned to become a part of the greater Greater Lubombo Transfrontier Conservation and Resource Area.[151]

All land situated in the IWP has been subject to land restitution claims, with nine of the fourteen claims having been settled to date.[152] This case study is confined to the Bhangazi community's claim. This community previously resided on the Eastern Shores

[145] Walker C "Land of Dreams: Land Restitution on the Eastern Shores of Lake St Lucia" (2005) 59 *Transformation: Critical Perspectives on Southern Africa* 5.

[146] These protected areas (and the dates on which they were established) are: St Lucia Park (1939); False Bay Park (1944); Sodwana Bay National Park (1950); Kosi Bay Nature Reserve (1950); Sodwana State Forest (1956); Eastern Shores State Forest (1956); Cape Vidal State Forest (1956); Nyalazi State Forest (1956); Maphelane Nature Reserve (1986); Coastal Forest Reserve (1992); Lake Sibaya Fresh Water Reserve (1994); St Lucia Marine Protected Area (2000); and Maputaland Marine Protected Area (2000).

[147] *Establishment of the Greater St Lucia Wetland Park and Authority* (GN 635 *GG* No. 21304 dated 23 June 2000) published under the World Heritage Convention Act (49 of 1999).

[148] These wetlands recognised under the *Convention on Wetlands of International Importance Especially as Waterfowl Habitats* (1983) 22 *ILM* 698, are: St Lucia System (1986); Turtle Beaches/Coral Reefs of Tongaland (1986); Kosi Bay (1991); and Lake Sibaya (1991).

[149] The Isimangaliso Wetland Park Authority was appointed as the management authority for the Park under the World Heritage Convention Act (49 of 1999) (section 9). Its structure, powers and functions are prescribed in the following regulations published under the Act: *Establishment of the Greater Lucia Wetland Park and Authority* (GN 635 *GG* No. 21304 dated 23 June 2000); and *Regulations in Connection with the Greater St Lucia Wetlands Park* (2000). It entered into a cooperative management agreement with the provincial conservation agency (Ezemvelo KZN Wildife) in 2001 to enable the latter to undertaken compliance, monitoring and enforcement operations within the IWP (*Isimangaliso Wetland Park Integrated Management Plan* (2008) 14).

[150] These changes were made with affect from 1 November 2007 (GN 438 *GG* No. 29887 dated 11 May 2007).

[151] For further information on these transboundary initiatives, see: http://www.peaceparks.org/.

[152] The land claims which have been settled to date are: Mbila; Mabaso; Bhangazi; Mdletshe; Makhasa; Umngobokazi; Jobe; Nsinde; and Sokhulu. The outstanding claims are: Dukuduku; Western Shores; Nqwenya; Triangle; and Coastal Forest Reserve. See further: *Conservation for the People with the People* (2010) 46-47.

Region[153] of Lake St Lucia situated in the southern section of the IWP.[154] Commencing with the declaration of the area as state land in the early 1900s and perpetuated by its subsequent declaration as the Eastern Shores State Forest and Cape Vidal State Forest in 1956,[155] the community was systematically and forcibly removed from the area by 1976.[156] In 1995 the community lodged a land claim under the Restitution of Land Rights Act for some 26 360 hectares of the Eastern Shores Region.[157] This process culminated in the resolution of the land claim by way of two agreements concluded in 1999: the *Settlement of Agreement*[158] and the *Memorandum of Understanding*.[159]

In terms of the *Settlement Agreement*, the Bhangazi community forfeited the restoration of their land in favour of financial compensation.[160] Compensation in the amount of R16.68m was divided between 556 households.[161] The identification of these qualifying households was determined partly through a scientific mapping process of historic settlements and partly by way of a politically negotiated compromise.[162] Compensation

[153] This region generally comprises of the strip of land situated between Lake St Lucia and the sea, located south of Cape Vidal and north of St Lucia. The claim to the Eastern Shores Region of Lake St Lucia predominantly concerned the land situated in the Cape Vidal State Forest and Eastern Shores State Forest.

[154] For a summary of the Bhangazi Community's historic occupation of the area, see: Walker C *Land-Marked* (2008) Jacana Media (Pty) Ltd Auckland Park 112-116; *Isimangaliso Wetland Park Integrated Management Plan* (2008) 20-23; Walker C "Land of Dreams" (2005) *Transformation: Critical Perspectives on Southern Africa* 3-7; and Thompson G "The Dynamics of Ecological Change in an Era of Political Transformations: An Environmental History of the Eastern Shores of Lake St Lucia" in Dovers S, Edgecombe R & Guest B (eds) *South Africa's Environmental History: Cases and Comparisons* (2002) David Phillip Publishers Claremont 191-212.

[155] The land was declared as state forests under the Forest Act (13 of 1941).

[156] For a discussion of the factors contributing to the community's removal from the Eastern Shores Region, see: Walker "Land of Dreams" (2005) *Transformation: Critical Perspectives on Southern Africa* 7-9; Walker *Land-Marked* (2008) 116-119; and Skelcher B "Apartheid and the Removal of Black Spots from Lake Bhangazi in Kwazulu-Natal, South Africa" (2003) 33 *Journal of Black Studies* 766-777.

[157] For a detailed discussion of the process that culminated in the lodging and settlement of the land restitution claim, see: Walker "Land of Dreams" (2005) *Transformation: Critical Perspectives on Southern Africa* 9-18; and Walker *Land-Marked* (2008) 119-133.

[158] Department of Land Affairs and the Community of the Former St Lucia Eastern Shores/Bhangazi Beneficial Occupants and Their District Descendants *Deed of Settlement in terms of Section 14(3) read with Section 42D of the Restitution of Land Rights Act No.22 of 1994*, dated 24 September 1999 (*Settlement Agreement*).

[159] Kwazulu-Natal Nature Conservation Board & Claimant Community *Memorandum of Understanding*, dated 5 October 1999 (*Memorandum of Understanding*).

[160] Clause 4.2.

[161] Clause 4.2.3. The list of qualifying households was annexed to the *Settlement Agreement* (1999) (Annexure C1, C2 and D).

[162] Walker "Land of Dreams" (2005) *Transformation: Critical Perspectives on Southern Africa* 18. 481 households failed to register by the prescribed deadline and accordingly did not qualify for compensation;

amounted to approximately R30 000 per household.[163] The *Settlement Agreement* also provided for the formation of a trust to administer the funds accruing to the claimant community under the *Memorandum of Understanding*.[164] The erstwhile Department of Land Affairs undertook to assist, 'as far as possible', those beneficiary households who wished to purchase alternative land with their compensation.[165]

In terms of the *Memorandum of Understanding*, concluded between the Bhangazi community and the Kwazulu-Natal Nature Conservation Board,[166] the then applicable management authority for the area, the community is afforded an array of tangible and intangible benefits associated with the Eastern Shores Region of the IWP. These include: a share of the proceeds accruing from a community levy charged on all tourists visiting the Region;[167] the establishment by the conservation authorities of a 4.6 hectare heritage site for the community at Lake Bhangazi;[168] the protection of community grave sites by the conservation authorities;[169] free but regulated community access to the heritage site and the grave sites;[170] priority access, use and harvesting rights to seeds, cuttings and culled animals;[171] and consideration for preferred employment where such

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and representatives from seventeen registered claimant households could not be found to receive the compensation (Larsson-Lidén L "For Whom is the Isimangaliso World Heritage Site" (2007) *Africa on the Global Agenda - Annual Report 2007* The Nordic Africa Institute 11.

[163] Clause 4.2.3.

[164] Clause 4.3.

[165] Clause 4.9.

[166] The rights and responsibilities under this agreement have subsequently been ceded to the Isimangaliso Wetland Park Authority.

[167] Clause 12. *The Memorandum of Understanding* (1999) provides that these funds are to be used for the purpose of education and the benefit of the community of beneficiaries. The funds generated through this levy are split between a range of stakeholders, namely: Bhangazi Community Trust (70 %); 20 % to the Mpukonyeni Tribal Authority; and 10 % to a Community Fund currently administered by Isimangaliso Wetland Park Authority.

[168] Clauses 3-6. The management authority is responsible for managing the heritage site. It is recognised that the community may wish to develop a heritage museum, cultural monument, traditional craft market and curio shop at the heritage site, but any plans therefore must be approved by the management authority.

[169] Clause 7.

[170] Clause 3 and clause 7. The community is compelled to give notice to the management authority of the date on which it wishes to access the Park, the number of people and the reason for access. Furthermore, the access has to take place within the Park's gate hours and in accordance to the route prescribed by the management authority.

[171] Clauses 8-9. The exercise of such rights must however be 'in accordance with Board Policy' - presumably meaning the management plan for the Park. The most contemporary version of the management plan is the *Isimangaliso Wetland Park Integrated Management Plan* (2008).

opportunities arise in the IWP.[172] The majority of these benefits have been realised, including: the annual grant of access to communities to harvest ncema grass in the Park;[173] the allocation of service contracts to community SMMEs to undertake various functions within the Park;[174] and the creation of training and capacity-building programmes for community members.[175]

Regarding institutional arrangements, the *Memorandum of Understanding* reiterates the need for the community to form a trust to manage the funds accruing to it in terms of the community levy. It furthermore provides that the trust must represent the community in its dealings with the Park's management authority.[176] One member of the management authority shall be a trustee and one community trustee a member of the management authority's governing board.[177] The Bhangazi Community Trust was formed in 1999[178] and it has a representative on the Isimangaliso Wetland Park Authority's Board. Neither the *Settlement Agreement* nor the *Memorandum of Understanding* formally provides for community participation in the de facto management of the IWP. Nonetheless, the Bhangazi Community Trust has been consulted over the development of the Park's *Integrated Management Plan*[179] and relevant local area plans.[180]

The duration of the *Memorandum of Understanding* is generally indefinite, save for the provisions relating to the payment of the community levy that expire after 75 years.[181] A revised *Memorandum of Understanding* was signed in March 2006 partly replacing the original agreement.[182] The principal change affected by the revised agreement relates

[172] Clause 10.
[173] This ncema grass holds great cultural significance to the community as it is used to weave sleeping and sitting mats (*Conservation for the People with the People* (2010) 49).
[174] These functions have included: alien clearing; land rehabilitation; and the construction and maintenance of roads, fences and tourism infrastructure (*Conservation for the People with the People* (2010) 48).
[175] For a description of these programmes, see: *Conservation for the People with the People* (2010) 48.
[176] Clause 13.
[177] Ibid.
[178] Larsson-Lidén "For Whom is the Isimangaliso World Heritage Site" (2007) 11.
[179] *Isimangaliso Wetland Park Integrated Management Plan* (2008).
[180] These local area plans are developed in consultation with each claimant community (*Conservation for the People with the People* (2010) 47).
[181] Clause 2 read with clause 12.
[182] Larsson-Lidén "For Whom is the Isimangaliso World Heritage Site" (2007) 11.

to the shifting of the heritage site from the south-western to the eastern side of Lake Bhangazi where more substantial infrastructure is available to promote the development of the site.[183]

3. CONCLUSION

Within this chapter I have sought to illustrate, through the use of four case studies, the manner in which South Africa's policy-makers have sought to utilise the domestic conservation and land-reform regimes to implement CCAs during the past two decades. As should be evident from the above synopsis of their respective historical backgrounds and governance arrangements, these four case studies reflect a range of forms of protected areas; planning frameworks; land tenure schemes; institutional and decision-making structures; management regimes; access, use and benefit-sharing schemes; and financing and support options. I have purposely sought to present this synopsis in an objective manner omitting any critical consideration of the respective merits of each and challenges and/or successes that have accompanied their implementation. The reason for this is that the above synopsis provides the context for the following chapter in which I critically consider the extent to which the four case studies reflect adherence to the essential elements theoretically underlying successful CCAs. It is to this critical analysis that I now turn.

[183] Ibid.

CHAPTER 9

EVALUATING SOUTH AFRICA'S EXPERIMENTATION WITH COMMUNALLY-CONSERVED AREAS

1. INTRODUCTION

Having reviewed the historical background and governance arrangements underpinning the four case studies in Chapter 8, I am now in a position to critically assess the extent to which they reflect adherence to the essential elements identified by international scholars as theoretically underpinning successful communally-conserved areas (CCAs).[1] This assessment forms the focus of this chapter. I wish to highlight at the outset that I do not purport to provide an exhaustive analysis of the extent to which each case study reflects the presence or absence of each of the essential elements. I rather seek to draw pertinent examples from the four case studies which: illustrate the challenges faced by domestic policy-makers in giving effect to these elements; highlight the inherent strengths and weaknesses of the existing legal framework; and hold lessons for future legislative reform to provide for more effective domestic implementation of these elements. In the interests of clarity, this critical assessment is structured according to the same themes utilised in Chapter 3, namely: types of CCAs; planning; consultation and negotiation; land tenure; declaration; institutions; management; access, use and benefit-sharing; and financing and support.

2. TYPES OF COMMUNALLY-CONSERVED AREAS

As highlighted in the analysis of the relevant domestic conservation regime,[2] and as borne out in the case studies, South Africa's legal framework does not provide expressly for CCAs as a designated form of protected area. Domestic policy-makers

[1] For a discussion of these essential elements, see Chapter 3 (Part 4).
[2] For a discussion of the domestic conservation regime, see Chapter 5 (Part 3).

have nonetheless used the applicable legal framework effectively to fashion different models of CCAs during the course of the past two decades. If one looks through the four case studies, three distinct models are apparent.

The first is reflected in the Richtersveld case study. It is underpinned by a contract park agreement in terms of which the community agreed to incorporate the land into the protected area. In terms of this agreement, the community has retained ownership of the land with extensive rights of occupation, access and use. While the agreement theoretically provides for the co-management of the protected area and the formation of a co-management institution,[3] it fails to clarify the nature, functions and powers of this institution. De facto management authority over the protected area therefore resides with a statutory authority, and the co-management institution largely constitutes a consultative as opposed to decision-making body. Commercial tourism infrastructure is very limited in the protected area and the community therefore receives very few economic returns from the area, but for the annual rental paid to it by the Government. This model would accordingly appear to reflect the owner/beneficiary governance option.[4]

The Bhangazi case study represents a very different typology. It is underpinned by two separate agreements, namely a settlement agreement and a beneficiation agreement.[5] Under the settlement agreement, which resolved the land restitution claim, the community received compensation for, as opposed to the restoration of, their land situated in the protected area. The community is therefore not the owner of the land and does not manage it as this responsibility has been assigned to a statutory authority. Under the beneficiation agreement, negotiated between the community and the protected area's management authority, the community accrues several access and use

[3] Referred to in the *Contract Park Agreement* (1991) as the Management Planning Committee. Its name was changed to the Joint Management Committee in 2002.
[4] For a discussion of the nature of this owner/beneficiary governance option, see Chapter 7 (Part 3.2.3).
[5] In the Bhangazi case study, this beneficiation agreement is formally referred to as the *Memorandum of Understanding* (1999).

rights and additional financial benefits from the area. This model would accordingly appear to reflect the non-owner/non-manager/beneficiary governance option.[6]

The approach adopted in both the Makuleke and Dwesa-Cwebe case studies appears to reflect a middle ground between the above two options. In both case studies, ownership over the land situated in the protected area is restored to the community in terms of the settlement agreement. In stark contrast to the Richtersveld case study, these ownership rights are severely curtailed with the settlement agreements precluding rights of occupation, agriculture and grazing. The settlement agreements do provide, however, for a range of benefits for the community including government grants, development rights and strictly regulated access and use rights. Management authority in these case studies is regulated by a co-management agreement[7] The latter agreements provide for the co-management of the area by the community and the designated management authority, establish a co-management committee[8] and detail its composition, powers and functions. The model adopted in these two case studies would accordingly appear to reflect the owner/co-manager option,[9] although some may argue it rather reflects the owner/beneficiary option owing to the problems associated with the functions of the co-management committees in both protected areas.[10]

The respective merits of these governance models, and the components which underlie them, will be analysed more fully below where I discuss the issues of tenure, management and beneficiation. What is important to note at this stage is the narrow array of governance options used by the Government to bridge the conservation and land reform divide. Notable omissions include the following governance options:

[6] For a discussion of the nature of this non-owner/non-manager/beneficiary governance option, see Chapter 7 (Part 3.2.6).
[7] In the case of the Makuleke case study, the co-management agreement is incorporated in chapter 2 of the main *Settlement Agreement* (1998). In the case of the Dwesa-Cwebe case study, the co-management agreement constitutes a separate agreement, termed the *Community Agreement* (2001).
[8] Referred to as the Joint Management Board in the Makuleke case study and the Co-Management Committee in the Dwesa-Cwebe case study.
[9] For a discussion of the nature of this non-owner/non-manager/beneficiary governance option, see Chapter 7 (Part 3.2.6).
[10] For a discussion of the challenges associated with the functioning of the co-management committees, see Chapter 9 (Part 8).

owner/manager; non-owner/manager; and non-owner/co-manager.[11] The picture becomes more skewed if one 'downgrades' the categorisation of the Makuleke and Dwesa-Cwebe case studies to the owner/beneficiary option as alluded to above. The result would be the Government effectively implementing two of the six available governance options for facilitating the role of communities in protected areas.[12] This would in turn reflect a failure on the part of domestic policy-makers to adhere to the call of the international community to afford greater recognition to co-managed protected areas and indigenous peoples and local community conserved areas, as categorised by the IUCN.[13]

Despite the limited sample of case studies I have used to extrapolate this conclusion, the following factors would appear to justify my alarm. The governance model at play in the Richtersveld case study has not been replicated and appears to be flailing.[14] The governance model present in the Makuleke case study has been used as a precedent to settle the majority of the land claims in protected areas in the past decade.[15] This is notwithstanding the word of caution expressed by several commentators that each claim is unique and while lessons can be extrapolated from one area to the next, 'this should be done with caution so as not to oversimplify experiences'.[16] This is furthermore notwithstanding the extensive critique that has been levelled against this specific governance model in the past few years,[17] with it having been labelled as 'financially

[11] For a discussion of these options, see: Chapter 7 (Parts 3.2.1, 3.2.4 and 3.2.5).
[12] For a discussion of the governance options prevalent in South Africa's domestic legal framework, see: Chapter 7 (Part 3.2).
[13] For a discussion of the international importance ascribed to these forms of governance, see: Chapter 2 (Part 3.3).
[14] In 2006, the Richtersveld community gave notice of its intention to withdraw from the *Contract Park Agreement* (Grossman D & Holden P "Towards Transformation: Contract Parks in South Africa" in Suich H, Child B & Spenceley A (eds) *Evolution and Innovation in Wildlife Conservation* (2009) Earthscan London 360).
[15] Kepe T "Land Claims and Comanagement of Protected Areas: Exploring the Challenges" (2008) 41 *Environmental Management* 312.
[16] De Villiers B & Van den Berg M *Land Reform: Trailblazers: Seven Successful Case Studies* (2006) KAS Johannesburg 28. See further: Walker C *Land-Marked* (2008) Jacana Media (Pty) Ltd Auckland Park 140.
[17] See generally: De Koning M "Co-Management and its Options in Protected Areas of South Africa" (2009) 39(2) *Africanus* 7-8; Kepe (2008) *Environmental Management* 314-318; Kepe T, Wynberg R & Ellis W "Land Reform and Biodiversity Conservation in South Africa: Complementary or in Conflict" (2005) 1 *International Journal of Biodiversity Science & Management* 13; Reid H "Contractual National Parks and Makuleke Community' (2002) 29(2) *Human Ecology* 152; and Isaacs M & Mohammed N *Co-Managing*

unsustainable'[18] and leading to a new form of 'ecological apartheid' in rural South Africa.[19] It is highlighted with concern that this very governance model forms the basis of the *National Co-Management Framework*,[20] the main policy for settling the extensive outstanding land restitution claims in protected areas.[21] The *National Co-Management Framework*, with its strong bias towards the lease option, effectively advocates an even narrower approach to the owner/co-manager option than that implemented in the Makuleke case study.[22] Finally, further concern emanates from the Government's moratorium placed on land restoration as an option for settling the outstanding extensive land restitution in the Kruger National Park.[23] This effectively nullifies the implementation of even the narrow formulation of the owner/co-manager option as reflected in the *National Co-Management Framework* in this Park. The potential for this moratorium to 'spread' to other protected areas of national and international importance cannot be discounted.

Therefore, if one objectively considers the case studies together with recent policy initiatives to improve cooperative governance between the conservation and land reform regimes, it would appear safe to conclude that the scope of governance options being advocated by the Government to facilitate the role of communities in protected areas is becoming narrower and narrower. This is notwithstanding the prevalence of legal tools within South Africa's contemporary conservation and land reform regimes through which a far broader array of governance options could be implemented.[24]

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the Commons in the 'New' South Africa: Room to Manoeuvre (2000) Commons Southern Africa Occasional Paper No.5 CASS/PLAAS Harare/Bellville 1.

[18] Groenewald Y & Macleod F "Land Claims "Could Kill Kruger"' (2005) *Mail and Guardian* (18 February). These doubts largely stem from what SANParks officials believe are skewed perceptions on the money to accrue from eco-tourism concessions in the Pafuri Region. See further: Reid (2002) *Human Ecology* 144.

[19] Magome H & Murombedzi J "Sharing South African National Parks: Community Land and Conservation in a Democratic South Africa" in Adams W & Mulligan M (eds) *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (2003) Earthscan London 119 & 130.

[20] Department of Environmental Affairs *National Co-Management Framework* (2010).

[21] For a discussion of the *National Co-Management Framework* (2010), see Chapter 7 (Part 2.2).

[22] For a detailed discussion of this issue, see Chapter 7 (Part 2.2.2).

[23] The Presidency: Republic of South Africa *Cabinet Media Statement* "State Announces Decision on Kruger National Park Land Claims", dated 28 January 2009.

[24] For a discussion of these governance options and the manner in which they could be implemented through South Africa's current legal landscape, see Chapter 7 (Part 3.2).

3. PLANNING

The rationale for comprehensive planning preceding the establishment of all forms of protected areas, including CCAs, is diverse.[25] It identifies land of high conservation value worthy of incorporation within formally proclaimed protected areas. It ensures that all relevant stakeholders with vested interests in the formation and administration of the protected area are identified and drawn into the consultation and negotiation process. It guides the selection of an appropriate form of governance for the area. It informs the development of a management planning framework tailored to suit the environmental priorities of the area. It provides an understanding of the social, economic and development priorities of those people living within and adjacent to the area. It highlights viable forms of access, use and benefit-sharing schemes that could improve rural development and the livelihoods of these people. Finally, it identifies possible viable options for financing the formation and administration of the area.

Given the protracted nature of the processes that culminated in the establishment of each of the case studies, one would ordinarily presume that they incorporated a comprehensive planning process.[26] However, if one surveys the array of challenges reflected in several of the case studies, it would appear that the planning process that preceded their formation was less than ideal. These challenges include: the omission of relevant stakeholders from the consultation and negotiation process;[27] the selection of inappropriate forms of governance;[28] the absence or flawed nature of certain of the management planning frameworks;[29] the prescription of unrealistic and inequitable access, use and benefit-sharing schemes;[30] the failure to match local developing planning frameworks with the management planning frameworks of CCA;[31] and the

[25] For a discussion of this broad element, see Chapter 3 (Part 4.2).
[26] The duration of the processes which culminated in the formation of the four case studies ranged from three to six years. See further in this regard, Chapter 9 (Part 5.1).
[27] For a discussion of this issue, see Chapter 9 (Part 5).
[28] For a discussion of this issue, see Chapter 9 (Part 2) and Chapter 9 (Part 8.1).
[29] For a discussion of this issue, see Chapter 9 (Part 8.3).
[30] For a discussion of this issue, see Chapter 9 (Part 9).
[31] For a discussion of this issue, see Chapter 9 (Part 10).

failure to canvas the full array of options for financing and supporting the CCA.[32] Given that these challenges are discussed in the above specific contexts, they do not bare repeating here.

4. LAND TENURE

Secure communal tenure and genuine proprietorship of the natural resources situated in the area are identified as necessary prerequisites for long enduring common-pool natural resource institutions.[33] If one synthesizes the essential elements relating this component of land tenure, they can effectively be grouped under four main issues: the form of land tenure; the clarity of rights underpinning such land tenure; the process leading to securing such rights; and the manner in which the land tenure regime recognises and provides for the communal nature of such rights.

4.1 FORM OF LAND TENURE

The four case studies appear to adopt an all or nothing approach to the issue of land tenure. In the Richtersveld, Makuleke and Dwesa-Cwebe case studies, the founding agreements[34] expressly recognise the communities' full title to the land. In contrast, the community relinquished their title in the Bhangazi case study. This provides some evidence of the domestic legal regime providing for a diversity of tenure options and domestic administrators using such diversity to match the appropriate land tenure option to the specificities of the particular area. What is disconcerting, however, is that if one surveys available Government documents which record the preferred method for settling validated land restitution claims in protected areas, almost all favour the restoration of full title without clear justification.[35] What is furthermore disconcerting is

[32] Ibid.
[33] For a discussion of this element, see Chapter 3 (Part 4.4).
[34] This term is used broadly to refer to the array of agreements that underpin the establishment of the CCAs, including the settlement agreements, co-management agreements, beneficiation agreements, community agreements and lease agreements.
[35] This conclusion is based on the fairly crude statistics contained in the only available document which cumulatively captures the nature and status all land restitution claims in protected areas, namely: Department of Environmental Affairs *Status of Land Claims in Protected* Areas (2010) Unpublished

that while the Restitution of Land Rights Act expressly makes provision for the restoration of full title and limited title, in the sense of a 'right in land',[36] the latter option is yet to be utilised in the context of settling land restitution claims in protected areas. Several commentators have advocated the domestic implementation of a less hierarchical and more diversified rural land rights model by way of extending the range of land rights capable of formal registration or through affording certain land rights statutory protection.[37]

Some may argue that by returning full title the South African regime affords the community the desired 'genuine proprietorship of the nature resource' situated in the protected area.[38] This would not however necessarily appear to be the case. As illustrated in all three case studies in which 'full title' has been restored to the community, their 'ownership' of the land is significantly restricted by several conditions curtailing their access to, use and development of the land and the natural resources located on it. These conditions are furthermore registered against the title deeds of the property thereby entrenching their perpetuity. Therefore, while supposedly holding full title over the land, the communities in these CCAs are more akin to rights holders, and very limited rights holders at that. If this was the intended outcome, it is surprising why the grant of access and use rights as opposed to full title was not canvassed as a preferred settlement option. As highlighted above, this option is expressly provided for in the Restitution of Land Rights Act and would provide a more realistic match to the de

document (dated February 2010). According to this document, of the 121 land restitution claims lodged in protected areas, the preferred method of settlement is as follows: 95 (land restoration); 2 (restoration of alternative land); 3 (financial compensation); 2 (part land restoration and part compensation); 19 (not recorded and therefore not taken into account for the purpose of the calculation). In summary, 95 of the 102 claims (96 %) favour the restoration of full title as the preferred method of settlement.

[36] For a detailed discussion of this issue, see: Chapter 6 (Part 2.1). See further: Mostert M "The Diversification of Land Rights and its Implications for a New Land Law in South Africa - An Appraisal Concentrating on the Transformation of the South African System of Land Registration" in Cooke E (ed) *Modern Property Law Studies - Volume 2* (2002) 7-9; and Carey-Miller D & Pope A *Land Title in South Africa* (2000) Juta & Co Ltd Cape Town 320-325.

[37] See generally: Sjaastad E & Cousins B "Formalisation of Land Rights in the South: An Overview" (2009) 26(1) *Land Use Policy* 1-9; Pienaar G "The Land Titling Debate in South Africa" (2006) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 435-455; Mostert "The Diversification of Land Rights" in Cooke *Modern Property Law Studies* (2002) 3-25; Pienaar G *The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas* (2001) Constitution and Law IV, Seminar Report No.6, KAS Johannesburg 107-125; and Van der Walt A "Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa" (1999) 64(2) *Koers* 259-294.

[38] For a detailed discussion of this element, see Chapter 3 (Part 4.4).

facto land tenure arrangement evident in each of these areas. It may be argued that the communities in question would never have agreed to such an arrangement owing to the central importance they placed on the return of full title during their pre-settlement negotiations. However, effectively clouding the issues regarding land tenure rights for the purpose of reaching agreement without clearly enunciating the nature of such rights and securing agreement thereon, simply leads to confusion, dissatisfaction and ultimately community backlash.[39] It furthermore promotes the flawed impression amongst rural claimant communities that the restitution of full tenure will alone solve their economic and social woes.[40]

Several commentators have recorded such confusion and dissatisfaction over the land tenure arrangements in all four case studies. In the Dwesa-Cwebe case study, it has been argued that the return of ownership of the land is on such a conditional basis that nothing has changed 'on the ground'[41] and that what has actually been transferred is not ownership, but rather a 'bundle of duties and a handful of rights'.[42] The community's frustration at not being treated as 'landlords' has been recorded in the Makuleke case study.[43] So too have concerns that the tenure regime adopted in the Makuleke case study fails to address skewed landownership patterns in the region,[44] sees the interests of conservation trumping those of the community, and has ultimately resulted in the

[39] De Villiers et al *Land Reform: Trailblazers* (2006) 29.
[40] De Villiers et al *Land Reform: Trailblazers* (2006) 29; De Villiers B *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) Occasional Paper Series, KAS Johannesburg 57
[41] Fay D "Land Tenure, Land Use and Land Reform at Dwesa-Cwebe, South Africa: Local Transformations and the Limits of the State" (2009) 37 (8) *World Development* 1402-1403. See further: Palmer R, Kingwill R, Coleman M & Hamer N *The Dwesa-Cwebe Restitution Claim - A Case Study as Preparation for a Field Based Learning Programme* (2006) Phuhlisani Solutions CC Cape Town 52; and Palmer R *From Title to Entitlement: The Struggle Continues at Dwesa-Cwebe* (2003) Fort Hare Institute of Social and Economic Research Working Paper No.46, University of Fort Hare Alice 18.
[42] Fay D "Property, Subjection and Protected Areas - The 'Restitution' of Dwesa-Cwebe Nature Reserve, South Africa" in Fay D & James D (eds) *The Rights and Wrongs of Land Restitution* (2009) Routledge-Cavendish New York 33-34.
[43] Robins S & Van der Waal K "'Model Tribes' and Iconic Conservationists? The Makuleke Restitution Case in the Kruger National Park" (2008) 39(1) *Development & Change* 67.
[44] Ramutsindela M "The Perfect Way to Ending a Painful Past? Makuleke Land Deal in South Africa" (2002) 33 *GeoForum* 23.

community losing its 'traditional methods of subsistence, family organisation, political structures, economic self-sufficiency, and concept of home'.[45]

The most extreme dissatisfaction is recorded in the Richtersveld case study where the community has issued notice of its intention to withdraw from the original contract park agreement in the hope of strengthening their 'actual' tenure rights over the land.[46] The option to withdraw from the founding agreements in the Makuleke and Dwesa-Cwebe case studies is yet to accrue. However, when they do so in 2013 and 2021 respectively, the Government may well be faced with similar notices given the level of dissatisfaction emanating from these areas.

Interestingly, this level of dissatisfaction is not limited to those areas where full title has been returned. There is also recorded discontent on the part of the Bhangazi community regarding the 'forfeiture' of their ownership of the Eastern Shores Region of the Isimangaliso Wetland Park.[47] This would appear to provide a further illustration of the Government's failure to explain and canvas properly the full array of land tenure options with the community in advance of settlement.

Commenting on the merits of the restitution programme in 2002, Kepe and Cousins concluded that the restitution process 'has not contributed much thus far to rectifying the extreme imbalance of ownership of productive resources', has made 'little difference' to the lives of rural communities, and 'failed' to bring about true transformation in land ownership patterns.[48] Judging from the communities' frustrations emanating from the four case studies canvassed above, I would argue that these sentiments continue to ring true today.

[45] Friedman J "Winning Isn't Everything: What the Makuleke Lost in the Process of Land Restitution" (2005) BA Thesis (Environmental Studies) University of Chicago 2-3.
[46] Grossman et al "Towards Transformation: Contract Parks in South Africa" Suich et al *Evolution and Innovation* (2009) 360.
[47] Walker *Land-Marked* (2008) 111.
[48] Kepe T & Cousins B *Radical Land Reform is Key to Sustainable Rural Development in South Africa* (2002) Policy Brief No.3, PLAAS Bellville 3-4.

4.2 CLARITY OF LAND TENURE RIGHTS

The problem relating to the selection of the appropriate de iure land tenure regime to match the de facto land tenure reality is compounded in all four case studies by the fuzzy nature of the terms and conditions contained in their founding agreements. The terms regulating land tenure, and the restrictive conditions placed on tenure rights, are generally vaguely worded, ill-defined and frequently dependent on other documents to distil their content.[49] Perhaps the most extreme example of this is the Dwesa-Cwebe case study, where the communities' land tenure rights effectively have to be distilled from several different documents each containing different terminology.[50] Some commentators have identified this uncertainty regarding 'what is being delivered' as one of the key problems underlying the broad restitution programme and have warned that 'unless we come to a clear answer on how to implement restitution in a way that is consonant with its ends, we might well find we have no restitution programme at all'.[51]

4.3 LAND TENURE PROCESS

An additional element recognised as underlining successful CCAs is an issue of process, specifically the need to align domestic conservation and land reform regimes that regulate the formation and management of such areas.[52] The South African Government has introduced several measures over the past few years to improve such alignment, specifically the conclusion of the *Memorandum of Understanding* between the country's conservation and land reform authorities in 2007 and the publication of the *National Co-Management Framework* in 2010.[53] The presence of similar measures would no doubt have facilitated the settlement of the four case studies discussed in Chapter 8.

[49] Kepe (2008) *Environmental Management* 314-315.
[50] These documents are the: *Settlement Agreement* (2001); *Community Agreement* (2001); *Management Planning Framewor*k (undated); draft *Business Plan* (2000); and lease agreements concluded with the operators of the Haven Hotel (2006) and the private beach cottages (varied).
[51] Du Toit A "The End of Restitution: Getting Real About Land Claims' (1999) Unpublished paper presented at Land and Agrarian Reform Conference, Pretoria, 26-28 July 1999 5, quoted in De Villiers *Land Reform: Issues and Challenges* (2003) 66.
[52] For a discussion of this element, see Chapter 3 (Part 4.4).
[53] For a discussion of these two initiatives, see respectively Chapter 7 (Part 2.1) and Chapter 7 (Part 2.2).

These initiatives are not entirely free from criticism.[54] Notwithstanding their existence, several procedural aspects associated with particularly the land reform component of the regime continue to frustrate the establishment and functioning of domestic CCAs. The first relates to the cumbersome procedures associated with the disposal of state land, typically the form of land subject to the communal land restitution claim.[55] Specific procedural obstacles that have been identified in this regard relate to surveying the land; valuing the land; securing directives from the relevant authorities; and obtaining approval for the disposal of state land from the Minister of Public Works and/or the Ingonyama Trust.[56] The second relates to the slow transfer of title deeds.[57] The delay in their transfer is regarded by several claimant communities as a purposeful attempt to preclude them negotiating lucrative development partnerships with third parties.[58] These trust deeds therefore hold not only great symbolic importance for the communities, but they are also of great practical importance in the context of beneficiation.[59] The reason for the delay in the transfer of these title deeds and the land reform process as a whole appears largely attributable to what have been damningly described as the 'slow, lazy, corrupt and incompetent officials' tasked with implementing the land reform component of the regime.[60] As highlighted by one commentator, the '(t)ragedy of the story of land reform in South Africa is that the country does not have officials in the DLA (Department of Land Affairs) who are capable of turning the legal framework, structures, plans and dreams into reality'.[61]

[54] For a critique of these two initiatives, see respectively Chapter 7 (Part 2.1) and Chapter 7 (Part 2.2).
[55] These procedures are generally regulated by the State Land Disposal Act (48 of 1961). In KwaZulu-Natal, where the bulk of land in rural areas is held by the Ingonyama Trust, the disposal procedures are regulated by the KwaZulu-Natal Ingonyama Trust Act (3 of 1994).
[56] The above challenges are listed throughout the *Status of Land Claims in Protected* Areas (2010).
[57] Take for instance the Dwesa-Cwebe case study, where the title deed is yet to be transferred to the Dwesa-Cwebe Land Trust some nine years after the conclusion of the settlement (Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 43).
[58] Department of Environmental Affairs *Conservation for the People with the People - A Review of the People and Parks Programme* (2010) 36.
[59] For a detailed discussion of this issue, see Chapter 9 (Part 9).
[60] De Jager T "Reflecting the Experiences in Land Reform and Proposals on Alternatives" in Seider T (ed) *Land Reform in South Africa: Constructive Aims and Positive Outcomes - Reflecting on Experiences on the Way to 2014* (2009) Seminar Report No.20, KAS Johannesburg 2.
[61] Ibid.

4.4 RECOGNITION OF COMMUNAL NATURE OF TENURE

Interestingly, one of the reasons afforded by the land authorities for the delay in the transfer of the title deed to the community in the Dwesa-Cwebe case study is the continued absence of formal communal land tenure arrangements.[62] Some thirteen years have passed since the commencement of the land reform programme and the finalisation of a legal framework for communal tenure still appears to be some way off, given the recent declaration of the Communal Land Rights Act[63] as unconstitutional.[64] This is somewhat disconcerting, given that it is communal land tenure that underpins all settled and unsettled land restitution claims in protected areas.

As is evident in the three case studies where land tenure rights have been recognised or returned to the community, the authorities have been compelled to circumvent the absence of the communal land rights regime by transferring these rights to communal property associations,[65] trusts[66] or a mixture of the two.[67] While this approach has enabled the Government to proceed with the land restitution component of the land reform programme, it is fraught with problems.

Firstly, from a theoretical perspective, it perpetuates a westernised approach to communal land tenure reform, one that seeks to generally individualise communal land tenure through land titling.[68] While it may be argued that title in most of the case studies is held by institutions which are communal in nature, the legal regime regulating these institutions does not recognize the flexible, inclusive, layered and nested nature of

[62] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 6, 11 & 51.
[63] Act 1 of 2004. For a discussion of this Act, see Chapter 6 (Part 3.2).
[64] For a discussion of the successful constitutional challenge brought against this Act, see Chapter 6 (Part 3.2).
[65] Take for instance the Makuleke case study, where the land was restored to the Makuleke Community Property Association.
[66] Take for instance the Richtersveld case study, where the Richtersveld Community Trust holds the tenure rights and administers the benefits derived from having contracted the land into the Richtersveld National Park.
[67] Take for instance the Dwesa-Cwebe case study, where the land was restored to the Dwesa-Cwebe Land Trust that in turn comprises of representatives from seven communal property associations.
[68] For a critique of this approach in the context of the Communal Land Rights Act, see Chapter 6 (Part 3.2).

communal land tenure rights and does not afford statutory recognition to both group rights and the myriad forms of fragmented-use rights which are prevalent in rural areas of South Africa.[69] Secondly, the functioning of communal property institutions (CPIs) created to hold the land tenure rights has been less than ideal.[70] Thirdly, the approach fails to clarify the confusion regarding the relationship between the new 'democratic' CPIs (predominantly the communal property associations) and their traditional 'apartheid' counterparts (the traditional councils and tribal authorities).[71] Fourthly, the approach does also not provide a workable model for those areas subject to competing land claims by one or more communities.[72]

The absence of the communal land tenure regime has clearly posed, and continues to pose, numerous challenges for the implementation of CCAs in South Africa. Any future regime will clearly need to address each of these challenges which are not only relevant to the context of CCAs, but rural land administration in general. The road towards forging this revised regime will no doubt be a rocky one given its potential to undermine the historic authority of traditional institutions over rural land administration.

5. CONSULTATION AND NEGOTIATION

The fifth broad element theoretically underpinning successful CCAs relates to consultation and negotiation.[73] Two main issues are relevant to this element: the consultation and negotiation process itself; and the outcome of the process that generally comprises of an agreement.

[69] Ibid.
[70] For a general discussion on the problematic functioning of communal property associations, see Chapter 6 (Part 3.1). For a detailed discussion of this issue in the context of the case studies, see Chapter 9 (Part 7.2).
[71] Ibid.
[72] Take for instance the Makuleke case study, where the settlement agreement failed to account for the competing claim of the Gumbu-Mutele Community, operating through the Vhembe CPA, to certain portions of the Matshakatini Nature Reserve. See further: Whande W *Trans-boundary Natural Resource Management in Southern Africa: Local Historical and Livelihood Realities within the Great Limpopo Trans-frontier Conservation Area* (2007) Research Report No.25, PLAAS Bellville 26-31.
[73] For a discussion of this element, see Chapter 3 (Part 4.3).

5.1 NEGOTIATION PROCESS

A necessary precursor to the creation of a sustainable CCA is a consultation and negotiation process based on the principles of equity, inclusivity, mutual respect, trust, openness and transparency.[74] The first step in realising the above is identifying the relevant stakeholders who will be a party to the process. The negotiations that preceded the formation of the four case studies clearly involved a diverse array of stakeholders including representatives from the community, government, non-government and private sectors. This breadth of stakeholder participation is reflected in the broad array of parties that were signatory to the founding agreements.

Three specific challenges regarding stakeholder identification can be extracted from the case studies. The first relates to determining the scope and nature of the 'community' that should be party to the negotiations.[75] Take for instance the Bhangazi case study, where the difficulty in determining who should constitute the claimant community led to it becoming a fuzzy part scientific and part political process.[76] The Dwesa-Cwebe case study provides a further excellent example of this conundrum, where notwithstanding the existence of diverse claimant communities residing adjacent to the protected area,[77] these communities were effectively grouped together under an 'imagined community' for the purpose of the land restitution process.[78] This 'denial of diversity' led to the community being defined and organised 'around a common goal of access to natural resources and the benefits accruing from land ownership.'[79] Fay cites this as one of the

[74] For a discussion of this issue, see Chapter 3 (Part 4.3).
[75] See further: Matose F, Mandondo A, Mosimane A, Aribeb K, Chikozho C & Jones M *The Membership Problem in People-Cantered Approaches to Natural Resource Management in Southern Africa* (2006) Policy Brief No.20, PLAAS Bellville 1-4.
[76] Isimangaliso Wetland Park Authority *Isimangaliso Wetland Park Integrated Management Plan* (2008) 63; and Walker C "Land of Dreams: Land Restitution on the Eastern Shores of Lake St Lucia" (2005) 59 *Transformation: Critical Perspectives on Southern Africa* 2.
[77] For a comprehensive analysis of the differentiation which existed between the communities residing adjacent to the Dwesa-Cwebe Nature Reserve at the time the land restitution settlement was being negotiated, see: Fay D & Palmer R "Poverty and Differentiation at Dwesa-Cwebe" in Palmer R, Timmermans H & Fay D (eds) *From Conflict to Negotiation - Nature-Based Development on South Africa's Wild Coast* (2002) HSRC Press Pretoria 146-171.
[78] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 5; and De Satgé R *Learning Programme Review: Issues for the Development of Post-Settlement Support Strategy* (2006) 45.
[79] Fay "Property, Subjection and Protected Areas" in Fay et al *The Rights and Wrongs of Land Restitution*

fundamental reasons for the CCA unravelling as when such access rights and benefits were not forthcoming, the vision and glue that held the fictional community together became unstuck.[80] This issue appears to be less problematic where there is a clearly defined homogenous community living on or in close proximity to the land to be included in the CCA.[81] However, care must clearly be exercised not to create a fictional community where there is a range of competing, overlapping and exceedingly diverse communities residing on or adjacent to the land to be included in the CCA.[82] Caution must furthermore be exercised where the community to whom land tenure will be restored is geographically dispersed with little remaining tangible connection to either the land or fellow members of the original community.[83]

Allied to the above challenge, is that of integrating traditional councils and tribal authorities into the negotiation process, especially where these institutions assert their jurisdiction over the new democratic communal property institutions (CPIs) formed by claimant communities.[84] The traditional institutions clearly have an ongoing role to play in rural land administration and will need to be factored into the consultation and negotiation process until such time as South Africa's communal land tenure regime is finalised.[85]

(2009) 29; and Fay D & Palmer R "Prospects for the Redistribution of Wealth Through Land Reform in Dwesa-Cwebe" in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform into the 21st Century* (2000) PLAAS/NLC, Bellville/Braamfontein 196.

[80] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 5; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 45.

[81] Take for instance the Richtersveld case study, where the Richtersveld community, owing to fact that they were not removed from their land, retained their identity, social and political structures and traditional practices (Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 117-118).

[82] Take for instance the Dwesa-Cwebe case study, where the community surrounding the Reserve is very diverse. See further: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 5; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 45.

[83] Take for instance the Makuleke and Bhangazi case studies, where the communities were forcibly removed from their land and compelled to adopt new ways of life underpinned by different social structures (Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 117-118).

[84] Take for instance the historic tensions in the Makuleke case study between the Makuleke Communal Property Association and the Mhinga Tribal Authority. For a detailed discussion of this issue, see Chapter 9 (Part 7.2).

[85] For a discussion on the role of traditional councils and tribal authorities in rural land administration, see Chapter 6 (Part 5.3).

The third challenge relates to the failure to identify and involve key government stakeholders in the consultation and negotiation process. This is once again illustrated by the Dwesa-Cwebe case study where the failure to identify and include various environmental authorities and municipal authorities in the initial negotiations, effectively nullified the eco-tourism potential of the CCA[86] and frustrated the implementation of post-settlement development support within and adjacent to it.[87]

The identification of stakeholders is but one part of the process. Steps simultaneously need to be taken to ensure that all relevant stakeholders have the requisite capacity and resources to participate in the negotiation process. This is particularly crucial in the South African context where typically poorly resourced and capacitated rural land claimant communities are compelled to interact with well-capacitated and resourced conservation authorities. A failure to provide the former with the skills, capacity and resources to participate in the negotiation process may undermine the equity and legitimacy of any product emanating from it.[88] While there is some evidence of a softening in the attitude of conservation authorities toward claimant communities, capacity and resource imbalances have historically undermined the latter's negotiating power via-a-vis the former.[89]

If one surveys the four case studies, several factors appear to have influenced whether the community had sufficient capacity to convey, and 'hardness' to protect their interests in the negotiation process.[90] As reflected in both the Richtersveld and Makuleke case

[86] The Marine and Coastal Management Directorate of the erstwhile Department of Environmental Affairs and Tourism, who were not extensively involved in the negotiation process, declared the coast adjacent to the Dwesa-Cwebe Nature Reserve a closed fishing area following the conclusion of the *Settlement Agreement* (2001), thereby significantly undermining the eco-tourism potential of the area. This issue is discussed more fully in Chapter 9 (Part 8).
[87] The majority of the settlement grants accruing under the *Settlement Agreement* (2001) were transferred to the Amathole District Municipality that was not extensively involved in the negotiation process and the resultant agreement. This issue is discussed more fully in Chapter 9 (Part 10).
[88] Take for instance the Dwesa-Cwebe case study, where the discrepant resources and capacity of the government officials and the communities' representatives contributed to a very conservative value (R3.2m) being accorded to the land situated in the Dwesa-Cwebe Nature Reserve for the purpose of quantifying the communities' settlement compensation (De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 63).
[89] Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 130.
[90] Ibid.

studies, the existence of a homogenous community with a clearly defined membership minimised potential for intra-community conflict and facilitated the development of a strong unified negotiating position. This process was significantly aided by extensive external support provided by local and international development agencies and NGOs to these communities.[91] A further factor that could account for the Richtersveld community's extensive and unique rights of access, use and occupation in the Richtersveld National Park, is that it had effectively resolved the issue of land tenure prior to entering into negotiations with the conservation authorities to establish the CCA.

Three specific concerns have been raised in relation to the above factors influencing the communities' capacity to engage in the negotiation process. Firstly, some commentators have stated that the founding agreements fail to reflect the 'complexities of the preceding negotiations' and rather illustrate the ability of elite members of the community to secure their own personal interests above those of the majority.[92] Secondly, others have alluded to the propensity of development agencies and NGOs to prioritise their own agendas in the negotiation process over those of the local communities they supposedly sought to support.[93] Thirdly, some authors have cautioned that notwithstanding the relative bargaining strength of the community, the tendency of government authorities to advocate a 'mutual gains' approach as opposed to a 'distributive model' to the negotiations has often weakened the communities' power during the negotiation process.[94]

[91] In the context of the Richtersveld case study, see: Glavovic B "Resolving People-Park Conflicts Through Negotiation: Reflections on the Richtersveld Experience" (1996) 39(4) *Journal of Environmental Planning & Management* 489-493. In the context of the Makuleke case study, see: Grossman et al "Towards Transformation: Contract Parks in South Africa" in Suich et al *Evolution and Innovation* (2009) 363; De Villiers B *People and Parks - Sharing the Benefits* (2008) KAS Johannesburg 78; Robins et al "'Model tribes' and Iconic Conservationists?" (2008) *Development & Change* 68; and Steenkamp C & Uhr J *The Makuleke Land Claim: Power Relations and Community-Based Natural Resource Management* (2000) Evaluating Eden Series Discussion Paper No.18, IIED London 1.

[92] Kepe (2008) *Environmental Management* 319.

[93] Friedman "Winning Isn't Everything: What the Makuleke Lost in the Process of Land Restitution" (2005) 33.

[94] Fay D "Mutual Gains and Distributive Ideologies in South Africa: Theorizing Negotiations Between Communities and Protected Areas" (2007) 35 *Human Ecology* 92.

These problems should be mitigated somewhat by ensuring that the negotiation process through which the various stakeholders engage with one another is open, transparent and democratic in nature.[95] These characteristics should furthermore ensure that it provides a forum for existing conflicts of interests between all stakeholders to be openly aired and dealt with, ultimately leading to the breakdown of pre-existing power imbalances.[96] If one surveys the negotiation process which preceded the establishment of each of the case studies they were clearly protracted, ranging from between three and six years.[97] This would appear to provide evidence that the interests of expediency did not generally outweigh the value of rigorous consultation and negotiation. However, notwithstanding the protracted nature of the negotiations, the content of certain of the founding documents has been cited as reflecting significant power inequalities present within the negotiation process.[98] Furthermore, conflating the land reform process with the conservation process has been recorded as weakening the communities' bargaining position relative to the conservation authorities.[99]

In the absence of the conservation regime that is now in place in South Africa, the negotiation process was largely regulated by the Restitution of Land Rights Act and driven by the land authorities.[100] Housed within the six phases of the Act's land restitution process are numerous mechanisms for promoting public consultation within, and the transparency of, the process.[101] The case studies do however illustrate certain

[95] For a discussion of this element, see Chapter 3 (Part 4.3).
[96] Steenkamp et al *The Makuleke Land Claim* (2000) 3-4; and De Villiers B *Land Claims and National Parks: The Makuleke Experience* (1998) HSRC Press Pretoria 61.
[97] The duration of the negotiation process which preceded the establishment of each of the case studies were: Richtersveld case study - three years (from the filing of the initial interdict in 1989 which precipitated consultation with the community to conclusion of the *Contract Park Agreement* in 1991); Dwesa-Cwebe case study - six years (from lodging the land restitution claim in 1996 to conclusion of the *Settlement Agreement* and *Community Agreement* in 2001); Makuleke case study - four years (from lodging the land restitution claim in 1995 to conclusion of the *Settlement Agreement* in 1998); and Bhangazi case study - five years (from lodging the land restitution claim in 1995 to conclusion of the *Settlement Agreement* in 1999).
[98] In the context of the Makuleke case study, see: Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 119; and Ramutsindela (2002) *GeoForum* 21-22.
[99] In the context of the Makuleke case study, see: Steenkamp et al *The Makuleke Land Claim* (2000) 1.
[100] The only exception to this was the formation of the Richtersveld National Park that preceded the promulgation of the Restitution of Land Rights Act. The procedures for establishing the Park were prescribed under the National Parks Act.
[101] For a discussion of the six phases of the land restitution process and the manner in which they promote public participation within, and the transparency of, the negotiation process leading to the

problems associated with the implementation of this process that have on occasion undermined both the negotiation process and its resultant product. The exclusion or too late inclusion of all relevant national, provincial and local environmental authorities has on occasion led to confusion, skewed expectation and delay.[102] The land authorities also appear to have failed to present the full array of governance options for discussion during the land restitution process.[103] This has sometimes led to the selection of a governance option that does not match the needs of either the claimant community or conservation authority.[104] This state of affairs cannot simply be attributed to the absence of available governance options, as viable alternative options did exist prior to the prescription of South Africa's contemporary conservation regime.[105] It rather appears attributable to the somewhat blind reliance on precedent governance options (the most noteworthy of these being the Makuleke model); the symbolic importance attached to ownership by communities; capacity constraints amongst all stakeholders which precluded an appreciation of the full array of available options; the lack of coordination between the land reform and conservation authorities; and the absence of South Africa's contemporary conservation regime with its express promotion of the role of people in protected areas.

settlement of land restitution claims, see Chapter 6 (Part 2).

[102] Take for instance the Dwesa-Cwebe case study, where three key stakeholders relevant to the functioning of the CCA were neither integrally involved in the negotiation process, nor party to the founding agreements. These stakeholders were the Amathole District Municipality, the Mbashe Local Municipality and the erstwhile Department of Environmental Affairs and Tourism (specifically its Marine and Coastal Management Branch). See further Wynberg R & Sowman M "Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension' (2007) 50(6) *Journal of Environmental Planning and Management* 785-793.

[103] For a discussion of the Government's historic failure to present and consider all potential governance options, see Chapter 9 (Part 2).

[104] Take for instance the Makuleke case study, where some commentators have argued that the community may have been better off receiving alternative land or compensation, rather than seeking to obtain return of the land subject to several land-use restrictions that effectively nullify their benefits of ownership. See further: De Villiers B "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa: Constructive Aims and Positive Outcomes - Reflecting on Experiences on the Way to 2014* (2009) *Seminar Report No.20*, KAS Johannesburg 89; and Reid (2002) *Human Ecology* 146.

[105] During this era, the Restitution of Land Rights Act provided four main options in the context of land tenure: restoration, alternative land; compensation; or a mixture of the three. In the conservation context, the National Parks Act and several conservation Ordinances and Acts, also enabled landowners to contract their land into protected areas and to assume the management of these areas on occasion.

Given that the communities in the majority of the case studies were compelled to comply with the restitution process prescribed in the Restitution of Land Rights Act in order to secure their rights, it could be argued that the negotiation process was 'imposed rather than invited' and 'directive rather than directed'.[106] This restitution process has also been criticised as being overly bureaucratic and cumbersome.[107] This latter criticism would appear somewhat harsh taking into account the complexity of issues and interests at stake. Numerous of the criticisms levelled against the Act appear to be challenges that a rigorous consultation and negotiation process is specifically designed to uncover and resolve.[108] The bulk of the remainder appear to relate to either the resources, capacity and political will of the land authorities to fulfil their mandate[109] or the absence of communal land tenure legislation.[110]

The case studies therefore illustrate a number of challenges that require future resolution so as to ensure that the consultation and negotiation process is inclusive, open, transparent and democratic. This should ultimately lead to the conclusion of more equitable and sustainable founding agreements. It may also realise certain other

[106] For a discussion of this element, see Chapter 3 (Part 4.3).
[107] Commission on Restitution of Land Rights *Presentation of Annual Report (2008/2009)* by Chief Land Claims Commissioner (Mr Mphela) to the Select Committee on Land and Environmental Affairs, dated 11 August 2009; Commission on Restitution of Land Rights *Annual Report 2004/2005* (2005) 23; and Turner S & Ibsen H *Land and Agrarian Reform in South Arica: A Status Report* (2000) Research Report No.6, PLAAS Bellville 11.
[108] These problems, which are discussed in Chapter 6 (Part 2.2), include: difficulties locating claimants; rural claimants predominantly wanting restoration of land as opposed to equitable redress; overlapping and counter claims in respect of the same land; the prevalence of fraudulent claims; the uncooperative attitude of existing landowners; the pro-longed nature of negotiations owing to high sentimental value attached to rural land; the lack of cooperation of communities and local traditional leaders in providing adequate information; community in-fighting and inter-tribal disputes; the lack of understanding, capacity and impatience on the part of claimant communities; and unscrupulous third parties seeking to take advantage of successful claimant communities during post-settlement commercial transactions.
[109] These problems, which are discussed in Chapter 6 (Part 2.2), include: the lack of capacity and high turnover of staff within the Commission on the Restitution of Land Rights; the lack of resources and infrastructure to fund the research and negotiation stages of the restitution process; the high cost of purchasing land in rural areas; and the unregistered and unsurveyed nature of land in rural areas.
[110] These problems, which are discussed in Chapter 6 (Part 2.2), include: local traditional leaders seeking to use the land restitution process to resolve personal, chieftaincy and border disputes; internal factionalism between communal property associations and local traditional authorities; and the challenge of simultaneously seeking to upgrade security of tenure and implement communal tenure regimes in rural areas.

tangible benefits such as the development of an identity for, and unity between, disparate sectors of the 'community'.[111]

5.2 FOUNDING AGREEMENTS

If one juxtaposes the founding agreements that emanated from the consultation and negotiation processes that preceded the formation of the four case studies, a rich diversity is evident even in such a small sample. The agreements differ in name,[112] the range of parties that are signatory to them,[113] their form and nature,[114] their length and detail,[115] the range of annexure attached to them[116] and the assortment of laws under which they were concluded.[117] This diversity clearly reflects the stakeholders' endeavours to fashion agreements to suit the specificities of the particular CCA. However, this diversity simultaneously creates potential confusion, not only for those tasked with implementing the agreements, but also for those consulting them for precedents or considering them for academic purposes. A further aspect that

[111] Take for instance the Richtersveld case study, where the negotiation process is cited as building unity within the Richtersveld community and reinvigorating their cultural identify (Glavovic (1996) *Journal of Environmental Planning and Management* 494).

[112] The names ascribed to the agreements include: settlement agreements; community agreements; co-management agreements; memoranda of understanding; and contract park agreements.

[113] For a description of the range of parties to each, please refer to the full citations of these agreements in Chapter 8.

[114] Some of the agreements deal with land claim settlement issues, management issues and/or beneficiation issues in separate agreements (*Dwesa-Cwebe Settlement Agreement* (2001) and *Community Agreement* (2001); and the *Bhangazi Settlement Agreement* (1999) and *Memorandum of Understanding* (2001)) and others collapse them all into one (as in the case of the *Makuleke Settlement Agreement* (1998)).

[115] The body of the agreements range from 33 pages in the case of the *Makuleke Settlement Agreement* (1998) to a mere nine pages in the case of the *Richtersveld Contract Park Agreement* (1991).

[116] These annexure vary widely and include: the description, location, position and survey diagrams of the area (*Richtersveld Contract Park Agreement* (1991); *Makuleke Settlement Agreement* (1998); and *Dwesa-Cwebe Settlement Agreement* (2001)); a schedule of title deed restrictions (*Makuleke Settlement Agreement* (1998)); communal property association constitutions (*Richtersveld Contract Park Agreement* (1991)); community resolutions (*Bhangazi Settlement Agreement* (1999) and *Memorandum of Understanding* (1999)); lists of members of the claimant community (*Bhangazi Settlement Agreement* (1999)); master plans and management planning frameworks for the area (*Makuleke Settlement Agreement* (1998) and *Dwesa-Cwebe Settlement Agreement* (2001) respectively); and community agreements (*Dwesa-Cwebe Settlement Agreement* (2001)).

[117] The laws under which the agreements are concluded include: Restitution of Land Rights Act (in the case of the *Makuleke Settlement Agreement* (1998), *Dwesa-Cwebe Settlement Agreement* (2001) and the *Bhangazi Settlement Agreement* (1999)); National Parks Act (in the case of the *Richtersveld Contract Park Agreement* (1991)); and the National Forests Act (in the case of the *Dwesa-Cwebe Community Agreement* (2001)).

perpetuates such confusion is the vague and unrealistic manner in which many of the terms and conditions contained in the agreements are phrased.[118]

The way in which the agreements specifically regulate issues of land tenure have been considered above.[119] The manner in which they regulate the following issues will be considered in turn below: institutions; management; access, use and benefit-sharing; and financing and support.[120] What falls to be considered here is the extent to which the agreements reflect adherence to the following generic aspects. Do the agreements satisfactorily set out a common vision and set of objectives for the CCA? Do the agreements clearly define the boundaries of the CCA? Do the agreements adequately provide for conflict resolution? Are the agreements of a satisfactory duration? Finally, are the agreements flexible in nature with provision being made for periodic review and amendment?

Agreement on a common vision and set of objectives for establishing the CCA should emanate from the negotiation process. Recording this common vision and set of objectives at the outset of the written agreement provides not only clarity, but also a lens through which to interpret the provisions that follow it.[121] What is apparent from an analysis of the case studies is that none of the founding agreements do so. While most contain a preamble, recordal or introductory section, these are largely dedicated to summarising the statutory negotiation process that preceded the settlement. The vision and objectives for establishing the CCA therefore have effectively to be gathered from the body of the agreement, read together with the often numerous documents annexed thereto. This would not appear to be an ideal situation and is perhaps reflective of the failure of the parties to clearly define and agree on a common vision and set of objectives during the negotiation process.

[118] This has been highlighted in the discussion on land tenure above (Chapter 9 (Part 4)) and will be further illustrated in the discussion of the following substantive aspects of the agreements below: institutions; management; access and benefit-sharing; financing and support (Chapter 9 (Parts 7-10)) below.
[119] See Chapter 9 (Part 4).
[120] See Chapter 9 (Parts 7-10).
[121] For a discussion of this element, see Chapter 3 (Part 4.3).

Given that in the South African context, one is traditionally dealing with land claims within established protected areas, the issue of detailing the boundaries of the CCA is not generally an issue. In all three case studies in which the community holds title to the land, the boundaries of the area are clearly defined by way of reference to existing[122] and newly registered[123] survey diagrams annexed to the founding agreements. While the case studies illustrate general adherence in this respect, the costs associated with surveying and registering new survey diagrams have been highlighted as a challenge hampering the finalisation of several current land restitution claims in protected areas.[124] This challenge generally arises where the land restitution claim only covers a portion of an existing state-owned protected area; the same protected area is subject to several land restitution claims by different communities; or where the land restitution settlement agreement specifically excludes certain unsurveyed portions of an existing protected area. A typical example of the latter is the Bhangazi case study where notwithstanding the conclusion of the founding agreement over a decade ago, the heritage site on the shores of Lake Bhangazi is yet to be surveyed and established.[125]

Conflict regarding the implementation of the founding agreements is highly probable given the often highly politicised nature of the negotiation process leading to their conclusion and the conflicting agendas of the negotiating parties. This potential is exacerbated where the terms of the agreements are vaguely worded and open to differing interpretations. Rather than simply brushing such conflicts aside, several commentators are of the view that the creation of a true synergy between the competing parties requires these conflicts to be aired and dealt with through transparent dispute resolution procedures.[126] It is therefore essential that the founding agreements make provision for procedures of this nature. The agreements underlying the four case studies are rather disparate in this regard with some containing comprehensive dispute

[122] Take for instance the Dwesa-Cwebe and Richtersveld case studies.
[123] Take for instance the Makuleke case study.
[124] See generally *Status of Land Claims in Protected* Areas (2010).
[125] This has been recognized as one of the remaining challenges facing the implementation of the *Bhangazi Settlement Agreement* (*Status of Land Claims in Protected* Areas (2010)).
[126] Fay (2007) *Human Ecology* 87; and Steenkamp C & Grossman B *People and Parks: Cracks in the Paradigm* (2001) Policy Think Tank Series No.10, IUCN-ROSA Harare 7.

resolution procedures,[127] others somewhat vague procedures[128] and some others no procedures.[129] The merits of including such provisions are clearly evidenced by the constructive manner in they have been invoked to resolve disputes in certain of the case studies.[130] Calls have accordingly been made for all founding agreements to provide greater clarity on the parties' functions, detailed timeframes and procedures for declaring and mediating disputes.[131]

A further essential element is that the founding agreements should preferably be of a satisfactory duration with provision for periodic review and amendment.[132] The duration of the case studies' founding agreements ranges from indefinite periods to 21 years.[133] Provision is generally made for the renewal or termination of the agreement on notice to the other parties.[134] Some even allow one party to anticipate the termination of the agreement on notice to the other parties.[135] The above processes provide valuable opportunities for the parties to review and re-negotiate their agreements where necessary. Such flexibility is complemented in the founding agreements of all but the Richtersveld case study, with provision being made for periodic amendment.[136] The problems associated with omitting such a provision are reflected in the Richtersveld

[127] Take for instance the *Makuleke Settlement Agreement* (1998) (clauses 38-39 read with 43-44).
[128] Take for instance the: *Dwesa-Cwebe Settlement Agreement* (2001) (clause 13) read with the *Community Agreement* (2001) (clause 10); and the *Bhangazi Settlement Agreement* (1999) (clause 4.7) read with the *Memorandum of Understanding* (1999) (clause 14).
[129] Take for instance the *Richtersveld Contract Park Agreement* (1991).
[130] Take for instance the manner in which the dispute resolution mechanisms contained in the *Makuleke Settlement Agreement* (1998) were successfully invoked to resolve a dispute regarding the grant of hunting concessions in the Pafuri Region in 2001 (Turner S, Collins S & Baumgart J *Community-Based Natural Resource Management: Experiences and Lessons in Linking Communities to Sustainable Resource Use in Different Social, Economic and Ecological Conditions in South Africa* (2002) Research Report No.11, PLAAS Bellville 46).
[131] De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 48-49.
[132] For a discussion of this element, see Chapter 3 (Part 4.3).
[133] The agreements have the following duration: *Bhangazi Memorandum of Understanding* (1999) - indefinite (clause 2); *Makuleke Settlement Agreement* (1998) - 50 years (clause 24); *Richtersveld Contract Park Agreement* (1991) - 24 years (clause 1); and *Dwesa-Cwebe Settlement Agreement* (2001) and *Community Agreement* (2001) - 21 years (clause 8 and clause 5 respectively).
[134] The *Makuleke Settlement Agreement* (1998) allows either party to renew the agreement for a further term of 50 years or shorter, on 2 years notice to the other party (clause 24(2)). The *Richtersveld Contract Park Agreement* (1991) allows either party to terminate the agreement following the expiry of the initial 24-year term, on six years notice to the other party (clause 1).
[135] The *Makuleke Settlement Agreement* (1998) allows either party after the initial agreement has been running for at least twenty years, and on five years notice, to withdraw from the agreement (clause 24(1)).
[136] See for instance the: *Makuleke Settlement Agreement* (1998) (clause 49); and *Dwesa-Cwebe Settlement Agreement* (2001) and *Community Agreement* (2001) (clause 30 and clause 16 respectively).

case study where the parties were compelled to use the management planning process to effectively renegotiate the terms of their founding agreement.[137] While the majority of the founding agreements would accordingly satisfy this requirement, their formulation is not in every case clearly defined or equitable in their operation.[138]

6. DECLARATION

The negotiation and conclusion of the above agreements is not the end of the process. The establishment of the CCA must generally be formalised. This process should ideally comprise of notice and comment procedures, the formal registration or declaration of the CCA by way of government notice, and where necessary, the registration of any restrictive conditions against the title deed of the property to ensure their perpetuity.[139]

As has been highlighted throughout this dissertation, CCAs have in the South African context historically emerged through the settlement of communal land restitution claims in existing protected areas. Accordingly, they generally have not had to be formally proclaimed *ab initio*, but rather mutated from state-owned and managed protected areas to CCAs. Such was the case in respect of the Makuleke, Dwesa-Cwebe and Bhangazi case studies. The procedures regulating their formation (or perhaps it is more correct to refer to it as their transformation) have predominantly been those prescribed in the Restitution of Land Rights Act. These procedures do not warrant repeating here but for mentioning that they contain an extensive array of statutory mechanisms aimed at facilitating public participation in the run up to the conclusion of the settlement agreement and its subsequent formal certification by relevant land authorities.[140] It is

[137] For a discussion of the problems associated with this approach, see Chapter 9 (Part 8.3).
[138] Take for instance the *Dwesa-Cwebe Settlement Agreement* (2001), which contains no provision regulating its duration, termination or renewal. It simply cross refers to the *Dwesa-Cwebe Community Agreement* (2001) and prescribes that at least one year prior to its termination, the parties must renegotiate it for a further term of 21 years. A failure to do so would result in the management of the Dwesa-Cwebe Nature Reserve returning to the conservation authorities. No clarity is provided regarding what happens on the termination of the second period of 21 years, where this is triggered. This is clearly not a satisfactory formulation and may well lead to conflict as the expiry of the initial contract period approaches. See *Dwesa-Cwebe Settlement Agreement* (clause 8) read with the *Dwesa-Cwebe Community Agreement* (clause 5).
[139] For a discussion of this element, see Chapter 3 (Part 4.5).
[140] For a discussion of this process, see Chapter 6 (Part 2).

furthermore interesting to note that some of the provisions in the settlement agreements specifically relate to transforming the nature of the existing protected area. Take for instance the *Makuleke Settlement Agreement* that provided for the de-proclamation of the Pafuri Region of the Kruger National Park; [141] its re-proclamation as a contract national park;[142] and the registration of a number of conservation-orientated conditions against the title deed of the land.[143] Such an approach will no doubt continue to guide the resolution of the majority of outstanding communal land claims in protected areas, and hence the 'declaration' of CCAs through this process. It will however now be informed by South Africa's contemporary conservation regime[144] and the recent government initiatives aimed at clarifying the roles of domestic land reform and conservation authorities.[145]

The Richtersveld case study is one important exception to the norm in that its formation preceded the land restitution regime and was regulated purely under South Africa's pre-2005 conservation regime. The then applicable National Parks Act prescribed an array of formalities for establishing the national park, including the conclusion of contract park agreement with the community and the formal declaration of the area by way of publication of a notice in the *Government Gazette*.[146] Notably absent in this regime was adequate provision for public participation in the process.[147] This absence has been more than compensated for in South Africa's contemporary conservation regime that

[141] Clause 5. This process, regulated by section 2(3) of the then applicable National Parks Act (57 of 1976), was necessary in order to exclude the Pafuri Region from the Kruger National Park so as to enable its transfer to the community.
[142] Clause 23. This process, regulated by section 2B(1)(b) of the then applicable National Parks Act (57 of 1976), was necessary in order to reincorporate the Pafuri Region as a contract national park within the Kruger National Park.
[143] Clause 2. This process, regulated by the Deeds Registries Act (47 of 1937), ensures that even on the expiry of the contract park agreement concluded under the National Parks Act, the land shall be retained for conservation in perpetuity.
[144] For a discussion of this contemporary conservation regime, see Chapter 5 (Part 3.1).
[145] For a discussion of these recent government initiatives to link the conservation and land reform regimes, see Chapter 7 (Part 2).
[146] Section 2A read with section 2B of the National Parks Act (57 of 1976).
[147] Paterson A "Wandering About South Africa's New Protected Areas Regime" (2007) (1) *SA Public Law* 8.

provides a more consistent, open and transparent approach to the declaration of protected areas.[148]

It would therefore appear that whether CCAs are in the future created through transforming existing protected areas (through the land restitution process) or creating new protected areas *ab initio* (under the contemporary conservation regimes), the South African legal regime contains the requisite array of mechanisms for ensuring that the 'declaration' process is open, transparent and subject to the appropriate level of formality.

7. INSTITUTIONS

Representative, open and transparent institutions and decision-making processes are a further essential element identified as underlying successful CCAs.[149] Each case study has a unique institutional and decision-making structure. The principal institutions that play a role in their formation and administration are government authorities and CPIs. The structure, nature and role of these institutions are considered in turn below. However, before embarking on this analysis, it is important to highlight that provision is made in most of the case studies for co-management institutions to regulate the relationship between the government authorities and the CPIs. Their role is integrally related to the management of the area and is accordingly considered under Part 8 below.

7.1 GOVERNMENT INSTITUTIONS

Several authorities from different spheres and sectors of Government had a hand in the formation, and currently play a role in the administration, of the four case studies. These include land authorities,[150] environmental authorities[151] and municipal authorities.[152]

[148] For a comprehensive discussion of this contemporary conservation regime, see Chapter 5 (Part 3.1). See further: Paterson (2007) *SA Public Law* 14-16.
[149] For a discussion of this element, see Chapter 3 (Part 4.6).
[150] For a discussion of these land authorities and the role they play in the formation and administration of

Their precise role within each of the case studies varies significantly. In summary: the land authorities are generally tasked with managing the land restitution process and administering post-settlement support; the conservation authorities are generally responsible for managing the CCA single-handedly or in partnership with the CPI; and the municipal authorities are generally responsible for facilitating rural development in and around the CCA, and on occasion administering post-settlement support to it.

The form, nature, powers and functions of these government authorities are clearly prescribed in the Constitution and/or their constitutive statutes.[153] The manner in which they exercise their powers and functions is guided by the Promotion of Administrative Justice Act,[154] the Promotion of Access to Information Act,[155] the Intergovernmental Framework Relations Act[156] and the Public Finance Management Act.[157] Cumulatively, the above statutory framework should theoretically ensure that all actions and decisions taken by the government authorities relating to the formation and administration of CCAs take place in an open, accountable, lawful, reasonable, cooperative, coordinated and procedurally fair manner. Several challenges to this theoretical ideal have been noted in the case studies, particularly that of the Dwesa-Cwebe Nature Reserve.

The first challenge relates to cooperative governance. Many government authorities frequently have overlapping mandates over, and different visions for, one CCA. In the Dwesa-Cwebe case study, for example, a diverse range of government authorities spread across several government institutions housed in all three spheres of

CCAs, see Chapter 6 (Part 5.1).

[151] For a discussion of these environmental authorities and the role they play in the formation and administration of CCAs, see Chapter 5 (Part 3.3).

[152] These include district and local municipalities whose primary mandate in the context of CCAs is rural development, land-use planning and infrastructure and service delivery.

[153] For a discussion of the constitutional legislative and executive competence of the three spheres of Government to make and administer laws of relevance to CCAs, see Chapter 4 (Part 4). For information on the powers and functions of the relevant land authorities, see Chapter 6 (Part 5.1). For information on the powers and functions of the relevant conservation authorities, see Chapter 5 (Part 3.3).

[154] For a discussion of the relevance of this Act to CCAs, see Chapter 4 (Part 2.3).

[155] Ibid.

[156] Act 13 of 2005. The Act provides for structures and institutions to promote intergovernmental relations as well as mechanisms and procedures to facilitate the resolution of intergovernmental disputes.

[157] Act 1 of 1999. The Act strictly regulates the financial administration of all government departments.

Government have a role to play in its administration.[158] According to several commentators, the Dwesa-Cwebe Nature Reserve is 'caught in many of the symptoms of competition rather than co-operation' between government authorities,[159] with the resultant disease being a situation where 'everyone but no one is responsible'.[160] This has undermined not only the management of the Reserve, but also the transfer of development grants and restitution benefits to it.[161] These challenges have been further compounded by the rapid turnover of staff, inadequate handover procedures and the resultant loss of institutional memory and capacity amongst land authorities.[162] Capacity constraints, particularly amongst provincial conservation authorities and relating to their understanding and implementation of the new conservation paradigm promoted under South Africa's contemporary conservation regime, have also been recorded as undermining the functioning of the Reserve.[163]

A second challenge highlighted by the case studies relates to the role of municipal authorities within CCAs. The scope and nature of their functions has undergone a significant shift in post-Apartheid South Africa.[164] Not only has the scope of their jurisdiction been extended from small urban precincts to large rural areas,[165] but the

[158] For a description of the broad array of stakeholders which have vested interests in the Dwesa-Cwebe Nature Reserve, see: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 9-10 & 32-34.
[159] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 10.
[160] Clarke J "Trends in Forest Ownership, Forest Resources Tenure and Institutional Arrangement: Are they Contributing to Better Forest Management and Poverty Reduction? A Case Study from South Africa" Undated Research Report Prepared for Food and Agriculture Organisation (Forestry Department) (available at www.fao.org/forestry/12503-1-28.pdf) 9.
[161] Take for instance the lack of coordination between the Eastern Cape Parks and Tourism Agency, which de facto manages the terrestrial component of the Reserve; and the Department of Environmental Affairs: Marine and Coastal Management Directorate, which is supposed to manage the marine protected area situated directly adjacent to it. The lack of coordination between these two government authorities has frustrated effective compliance and enforcement in the Reserve and the ability of the community to generate economic benefits from it. This lack of cooperation is not only present between different conservation authorities but also between national and provincial land authorities. Poor relations between the national and regional offices of Land Claims Commission, for example, have also been identified as frustrating the implementation of post settlement support within and adjacent to the Reserve. See generally: Palmer *The Dwesa-Cwebe Restitution Claim* (2006) 6; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 47.
[162] De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 47.
[163] Fabricius C "Conservation and Communities-Learning from Experience" in Palmer et al *From Conflict to Negotiation* (2002) 261.
[164] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 11-12.
[165] In terms of the Local Government: Municipal Demarcation Act (27 of 1998) and Local Government: Municipal Structures Act (117 of 1998).

nature of their functions has been broadened from urban planning, infrastructure and service delivery to regional planning and decentralised land-use management.[166] Municipal authorities have therefore been thrust into the realm of rural land reform and development. Furthermore, municipal authorities have on occasion been drawn into the direct implementation of land restitution settlements in protected areas in the capacity as implementing agents.

Take for instance the Dwesa-Cwebe case study, where the Amathole District Municipality was appointed as the implementing agent for the *Settlement Agreement*.[167] Significant problems have been identified with this arrangement.[168] These problems stem from several quarters.[169] The municipal authority was not a party to the founding agreements and its rights and duties in respect of the protected area are accordingly ill defined. Moreover, the municipal authority is geographically removed from the community. This hampers communication and consultation. The municipal authority also has disparate development priorities to that of the community; and is compelled to comply with the stringent provisions of the Public Finance Management Act[170] when spending the communities' money. The above problems hold lessons for those contemplating implementing similar arrangements in the future. So too do the recent steps taken by the parties to resolve them such as: the creation of an overarching

[166] In terms of the Local Government: Transition Act (209 of 1993) and Local Government: Municipal Systems Act (32 of 2000). The manifestation of these functions is through the integrated development plans and spatial development frameworks that each municipal authority is compelled to prepare.
[167] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 12 & 44-49.
[168] In the context of the Dwesa-Cwebe case study, the following problems have been noted: a lack of communication and consultation between the municipal authority and the community; significant delays in the allocation of operational funding to enable the Dwesa-Cwebe Land Trust to fulfil its functions; expenditure by the municipal authority on what the community do not believe is core business; the failure by the municipal authority to timeously allocate the funds leading to the recall of R5m of the R10.5m in discretionary restitution grants and settlement planning grants by the National Treasury in early 2010; tenuous relations between the community and the municipal authority; and the absence of mechanisms to hold the municipal authority to account regarding its role as implementing agent. See: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 44-49; and *Summary Status Report - Dwesa-Cwebe Post Settlement Implementation* (2010) 2.
[169] See generally: Fay "Property, Subjection and Protected Areas" in Fay et al *The Rights and Wrongs of Land Restitution* (2009) 36-38; Fay (2007) *Human Ecology* 91; and Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 9-10 & 44-54.
[170] The stringent centralised and inflexible tendering provisions prescribed by the Public Finance Management Act have been cited as precluding the funding of more flexible 'labour-based practices' which promote local employment (Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 45-46).

structure, representative of all relevant CPIs and government authorities, to coordinate post-settlement support to the CCA and improve communication;[171] the conclusion of an agreement between the municipal authority and the CPI to regulate their relationship;[172] and the appointment of a dedicated project manager within the municipal authority to manage its responsibilities relating to the CCA.[173]

7.2 COMMUNAL PROPERTY INSTITUTIONS

Two forms of CPIs play a significant role in the administration of the four case studies. These are land trusts and communal property associations (CPAs) to which title over the land was restored, compensation was paid, management responsibilities ascribed and/or benefits attributed in terms of the founding agreements. The exact nature of the CPIs varies across all four case studies. In the absence of the legal regime providing for CPAs, the Richtersveld community had no real alternative but to form a land trust to represent them. As evidenced by the remainder of the case studies, the CPA is the chosen vehicle for representing and holding the interests of the community since the promulgation of the Communal Property Association Act. This is not surprising as this legislation was specifically introduced to fill the apparent void created by the absence of the country's communal land tenure regime. The only exception to this rule is the Dwesa-Cwebe case study, where owing to the diverse nature of the claimant community, a CPA represents each sector of the community, with a land trust formed to represent the joint interests of these associations in their dealings with third parties.

The statutory frameworks[174] and founding documents[175] that regulate the formation and administration of the above CPIs specifically seek to ensure that they operate in a

[171] A Project Steering Committee, comprising of representatives from the Dwesa-Cwebe Land Trust and the relevant municipal authorities was established in 2002. For a discussion of this issue, see: Chapter 8 (Part 2.3).
[172] Eastern Cape Parks Board *Annual Report 2008/2009* (2008) 22.
[173] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 44.
[174] These are: the Communal Property Association Act (28 of 1998) in the case of CPAs; and the Trust Property Control Act (57 of 1988) in the case of land trusts.
[175] These are: a constitution in the case of CPAs; a trust deed in the case of a land trust.

representative, accountable, transparent and democratic manner.[176] However, the functioning of the CPAs in most of the case studies reflect several challenges that preclude the realisation of this ideal.[177] These challenges either deal with factors inherent to the institution itself, or in relation to its dealings with other relevant institutions, particularly traditional authorities.

The first challenge inherent to the functioning of community property institutions relates to their composition. The diverse nature of claimant communities has frequently led to the creation of 'fictional communities' for the purpose of settling land restitution claims.[178] As illustrated in the Bhangazi case study, this has resulted in significant tensions between those who the Government regarded as legitimate claimants and other neighbouring communities, who whilst not having direct ancestral ties to the land are still dependent on it for their livelihoods.[179] Similar intra-group and inter-group conflicts have been recorded in the context of the Dwesa-Cwebe and Makuleke case studies.[180]

The second challenge relates to the alleged lack of democratic process characterising the functioning of the CPIs, which has led to deep frustration and distrust within and between members of the community. Several of the CPIs have been plagued by accusations of 'power mongering, nepotism or corruption'.[181] There have accordingly

[176] For a discussion in the mechanisms contained in these regimes that seek to promote characteristics of this nature, see Chapter 6 (Part 3.1 and Part 5.2).
[177] For a full discussion of the general challenges undermining the functioning of communal property institutions, see Chapter 6 (Part 3.1).
[178] For a discussion of this issue, see Chapter 9 (Part 5.1).
[179] Walker *Land-Marked* (2008) 109. See further: Walker (2005) *Transformation: Critical Perspectives on Southern Africa* 2; and Skelcher B "Apartheid and the Removal of Black Spots from Lake Bhangazi in Kwazulu-Natal, South Africa' (2003) 33 *Journal of Black Studies* 781.
[180] Clarke "Trends in Forest Ownership, Forest Resources Tenure and Institutional Arrangements" (undated) 9.
[181] Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 268. Take for instance the failure of the Bhangazi Community Trust to hold regular meetings and properly account to its constituency regarding the allocation of its share of the community levy; and trustee's commercial interests in eco-tourism operations undertake within the Isimangaliso Wetland Park (Larsson-Lidén "Research in the Midst of Controversy: 'You Coming Here is Like a Spear to Me'" (2008) *Africa in Search of Alternatives - Annual Report 2008*, The Nordic Africa Institute, 34-35; and Larsson-Lidén L "For Whom is the Isimangaliso World Heritage Site" (2007) *Africa on the Global Agenda - Annual Report 2007*, The Nordic Africa Institute 10 & 12). Furthermore, take for instance the Dwesa-Cwebe case study, where disquiet over the functioning of the Dwesa-Cwebe Land Trust has led to a faction within the community

been renewed calls for these institutions to be founded on clear objectives and be structured in a manner which promotes legitimate, accountable and transparent decision-making; with procedures for regular monitoring, reporting and review.[182] The Makuleke CPA provides a good illustration of recent moves to improve governance and facilitate better communication and consultation between it and its membership. These measures include: the organisation of the CPA into sub-committees; the establishment of three district development forums which comprise of broad membership from all relevant constituencies; and the creation of a consultative forum comprising of the village development committees in the area.[183]

The third challenge relates to the constantly evolving nature of the community. New conflicts and power struggles often emerge between different factions of a community, particularly where it is heterogeneous in nature and constantly evolving.[184] This is clearly reflected in the Bhangazi case study, where significant differences exist between the vision of the traditional elders of the community, with whom the founding agreements were negotiated and who administer the Bhangazi Community Trust, and the politicised youth who seek to challenge their authority.[185] Similar conflicts have been recorded in the context of the Makuleke case study.[186] It would therefore appear that provision should ideally be made for some form of flexibility to account for shifts in leadership and vision. However, as is illustrated by the frequent rotation of the leadership of the Makuleke CPA, the merits of such flexibility need to be carefully

seeking to establish a new trust. The new institution lacks formal legitimacy having not been properly constituted by all members of the community party to the original *Settlement Agreement*. Furthermore, it does not have signatory power and access to the original trust's bank which holds R2.1m paid to the community in terms of the *Dwesa-Cwebe Settlement Agreement (2001)*. See further: *Summary Status Report - Dwesa-Cwebe Post Settlement Implementation* (2010) 2.

[182] De Villiers *People and Parks - Sharing the Benefits* (2008) 83.

[183] Collins S "The Makuleke Conservation and Land Reform Project - A Conservation Rather than Community Development Success So Far" (2010) Unpublished paper 9-12; De Villiers *People and Parks - Sharing the Benefits* (2008) 74; and De Villiers et al *Land Reform: Trailblazers* (2006) 16-17.

[184] Fabricius C, Kock D & Magome H "Towards Strengthening Collaborative Ecosystem Management: Lessons from Environmental Conflict and Political Change in Southern Africa" (2001) 31(4) *Journal of the Royal Society of New Zealand* 831.

[185] Chellan N & Khan S "Contesting Ecotourism Development in the Isimangaliso Wetland Park in Kwazulu-Natal" (2008) 15(1) *Alternation* 274; Walker *Land-Marked* (2008) 139; and Walker (2005) *Transformation: Critical Perspectives on Southern Africa* 20.

[186] Carruthers J "'South Africa: A World in One Country': Land Restitution in National Parks and Protected Areas" (2007) 5(3) *Conservation & Society* 301.

weighed against the interests of certainty, consistency, productivity, succession planning and the retention of institutional memory and capacity.[187]

The fourth challenge relates to the fact that CPIs frequently lack the standing, capacity and resources to manage their dealings with third parties in an equitable, legitimate, open, transparent and accountable manner.[188] Lack of post-settlement support for building and sustaining these institutions has in the words of one commentator, left many 'dangling as discredited and powerless structures'.[189] The evidence emerging from the case studies is quite discrepant in this regard. The Makuleke CPA is regarded as fairly well capacitated and resourced,[190] no doubt the result of the substantial support it has received from local and international NGOs.[191] In stark contrast, the Dwesa-Cwebe Land Trust and its constituent CPAs, have been cited as lacking in capacity, resources and a clear governance structure; with their functioning fraught with conflict between the Trust and the CPAs.[192] The problems raise questions regarding the viability of an institutional model that requires eight different institutions, each requiring resourcing and capacity development, to collaboratively administer the community's interests over a single small CCA.

The final challenge inherent to CPIs relates to circumscribing the nature of their core function. As is prescribed in the legislation that provides for their formation and their constitutive documents, the core function of these institutions is to hold and administer communal property.[193] However, as is illustrated in by the Dwesa-Cwebe case study, these institutions are increasingly allocated land-use management and rural

[187] Take for example, the Makuleke CPA's Constitution that limits the tenure of CPA committee members to 3 years.
[188] Collins "The Makuleke Conservation and Land Reform Project" (2010) 17; and Turner et al *Community-Based Natural Resource Management* (2002) 30-35.
[189] De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 55. See further: Palmer *From Title to Entitlement: The Struggle Continues at Dwesa-Cwebe* (2003) 10; and Andrew M, Ainsley A & Shackleton C *Evaluating Land and Agrarian Reform in South Africa* (2003) Occasional Paper Series: Land Use and Livelihoods No.8, PLAAS, Bellville.
[190] De Villiers *People and Parks - Sharing the Benefits* (2008) 74.
[191] For a discussion of this support, see Chapter 9 (Part 5.1).
[192] Fay "Property, Subjection and Protected Areas" in Fay et al *The Rights and Wrongs of Land Restitution* (2009) 36-37; De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 49-52; and Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 45-50.
[193] For a discussion of the role of CPAs and land trusts, see Chapter 6 (Part 3.1 & Part 5.2).

development type functions.[194] This becomes problematic given that such functions fall outside the anticipated domain of these institutions and they are frequently ill-defined in the institution's constitutive documents. Furthermore, there is little clarity regarding how these functions should be coordinated with those undertaken and funded by local government. Coupled with the existing capacity and resource constraints discussed above, commentators have warned that these CPIs should not contemplate moving beyond the core function of communal land administration until such time as they fulfil their core function competently.[195]

It is not only the above challenges relating to the inherent nature and functioning of CPIs that are illustrated by the case studies. The second group of challenges facing these institutions relates to their dealings with other institutions, particularly institutions of traditional authority. These challenges are caused by the profound implications the Restitution of Land Rights Act and the Communal Property Association Act have had on rural land administration in South Africa.[196] In certain circumstances these laws undermine the historic powers exercised by traditional authorities, such as traditional councils and tribal authorities, over rural land administration.[197] This conundrum is compounded by the fact that the laws do so without clarifying the relationship between the new 'democratic' CPIs and their traditional 'apartheid' counterparts.[198] The resultant confusion and conflict generally arises where the land in a protected area that is restored to a CPI also falls under the jurisdiction of a tribal authority or traditional council.[199] Its impact has not only undermined the functioning of the CPIs, but also

[194] Hall R *The Impact of Land Restitution and Land Reform on Livelihoods* (2007) Research Report No.32, PLAAS Bellville 17; Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 8-9 & 51; De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 47-48; and Palmer *From Title to Entitlement: The Struggle Continues at Dwesa-Cwebe* (2003) 8-9.
[195] Turner et al *Community-Based Natural Resource Management* (2002) 35.
[196] Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 266.
[197] Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007) 41.
[198] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 9 & 51; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 52-53.
[199] In the context of the Makuleke case study, see: Robins et al (2008) *Development & Change* 55. In the context of the Dwesa-Cwebe case study, see: Fay "Property, Subjection and Protected Areas" in Fay et al *The Rights and Wrongs of Land Restitution* (2009) 36-37. In the context of the Bhangazi case study, see: Walker (2005) 59 *Transformation: Critical Perspectives on Southern Africa* 6-7.

detrimentally impacted on the functioning of several CCAs and the forging of 'local development plans and livelihood strategies' in and adjacent to them.[200]

However, some CCAs in South Africa are rather strangely cited for the high level of cohesiveness between the CPIs and the relevant traditional authorities. Take for instance the Makuleke case study, where the Chief of the Makuleke tribe was appointed and continues to stand as the chairperson of the Makuleke CPA.[201] The blurring of institutional functions and resultant close working relationship between the Makuleke CPA and the Makuleke Tribal Authority has been identified as one of the keys to the success of this CCA.[202] This apparent cohesiveness must, however, be understood within its context – the battle for recognition of the Makuleke chieftaincy and its attempts to circumvent the rival claim of the Mhinga chieftaincy to the land currently held by the Makuleke CPA.[203] This battle even resulted in the Makuleke CPA joining the proceedings in *Tongoane v Minister for Agriculture and Land Affairs*[204] in an attempt to further secure its tenure rights over the Pafuri Region of the Kruger National Park.[205]

Whilst lauded as a 'model tribe', there is however even evidence that the relationship between the Makuleke CPA and the Makuleke Tribal Authority is not entirely free of

[200] Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007) 45.
[201] De Villiers *People and Parks - Sharing the Benefits* (2008) 74.
[202] Grossman et al "Towards Transformation: Contract Parks in South Africa" in Suich et al *Evolution and Innovation* (2009) 364; and Robins et al (2008) *Development & Change* 55.
[203] Chief Mhinga, the head of the current recognised traditional council in the area, argued that the Makuleke fell under his authority as Chief Makuleke effectively constituted one of his headman since the Makuleke's forced resettlement at Ntlhaveni. Notwithstanding the land having been restored to the Makuleke CPA, the Makuleke continue to assert their chieftaincy claim and were party to the challenge to the Communal Land Rights Act, given its potential for reverting administration of the land held by the Makuleke CPA to the traditional council chaired by Chief Mhinga. For information on the origins and nature of this conflict, see: Claassens A & Hathorn M "Stealing Restitution and Selling Land Allocations: Dixie, Mayaeyane and Makuleke" in Claassens A & Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) University of Cape Town Press Cape Town 334-349; Robins et (2008) *Development & Change* 53-65; Spierenburg M, Steenkamp C & Wels H "Enclosing the Local for the Global Commons: Community Land Rights in the Great Limpopo Transfrontier Conservation Area" (2008) 6(1) *Conservation & Society* 91-92; and Ramutsindela (2002) *GeoForum* 19-20.
[204] 2010 (6) SA 214 CC. For a discussion on this case, see Chapter 6 (Part 3.2).
[205] The primary reason for the Makuleke CPA joining the proceedings was that under the Communal Land Rights Act, authority over the Pafuri Region of the Kruger National Park would potentially have returned to the Mhinga Tribal Authority owing to the Government failing to recognize the status of the Makuleke Tribal Authority (Collins "The Makuleke Conservation and Land Reform Project" (2010) 14-17).

tensions. These tensions arise from questions regarding gender representivity, the somewhat autocratic nature of the chairperson's decision-making, and the use of resources generated through concession agreements on tribal authority expenses.[206] The Makuleke CPA are seeking to resolve these problems by: allowing others to stand as chairperson of the CPA; changing the status of the Chief on the CPA to that of advisor; and more clearly delimiting the powers and functions of the Makuleke CPA and the Makuleke Tribal Authority. [207]

Similar tensions were evident in certain of the other case studies. In the Bhangazi case study the tensions between the Bhangazi Land Trust and the Mpukonyeni Tribal Authority were mitigated by allocating certain benefits under the *Settlement Agreement* to the Tribal Authority; and by the fact that the settlement comprised of compensation as opposed to land restoration.[208] Such a state of affairs is not, however, prevalent in the Dwesa-Cwebe case study where problems continue to abound between the Dwesa-Cwebe Land Trust, its constituent CPAs and the tribal authorities over land administration.[209]

The majority of the above problems regarding the relationship between the CPIs and the institutions of traditional authority are largely a remnant of the continued absence of a revised communal land tenure regime that clearly defines their respective roles with regard to rural land administration. The problems will continue to abound unless the next iteration of the Communal Land Rights Act adequately delineates their relationship.[210]

[206] Collins "The Makuleke Conservation and Land Reform Project" (2010) 14-17; Spierenburg M, Wels H, Van der Waal K & Robins S "Transfrontier Tourism and Relations Between Local Communities and the Private Sector in the Great Limpopo Transfrontier Park" in Hottola P (ed) *Tourism Strategies and Local Responses in Southern Africa* (2009) CAB International Cambridge 176; Robins et al (2008) *Development & Change* 64-65; and Reid (2002) *Human Ecology* 146.
[207] Spierenburg et al "Transfrontier Tourism and Relations between Local Communities and the Private Sector" in Hottola *Tourism Strategies and Local Responses in Southern Africa* (2009) 173; and De Villiers *People and Parks - Sharing the Benefits* (2008) 74.
[208] For a summary of these tensions, see: Walker (2005) *Transformation: Critical Perspectives on Southern Africa* 6-7.
[209] Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 6.
[210] Fay (2009) *World Development* 1425.

8. MANAGEMENT

The prescription of a clear, realistic, workable and flexible management regime tailored to suit the specificity of the area and the community living within or adjacent to it is a further recognised element of most successful CCAs.[211] If one surveys the case studies, they provide important lessons regarding the following issues that influence the realisation of the above ideal: the type of management regime; the nature of the management institutions; the form of management planning; the type of decision-making processes; and the nature of the de facto management activities undertaken in the CCA.

8.1 FORM OF MANAGEMENT

The management model inherent in the majority of case studies appears to be that of co-management. This model is reflected in the Richtersveld, Makuleke and Dwesa-Cwebe case studies, where management authority is apparently shared between the relevant government authority and CPI. The only exception to this rule is the Bhangazi case study where management authority vests solely in the Isimangaliso Wetland Park Authority, a statutory authority.[212]

The theoretical merits of the co-management model have been acknowledged, particularly where the CPI lacks the resources and capacity to manage the area itself.[213] Its domestic implementation, particularly in the Makuleke case study, was initially lauded as a great success.[214] More recently, the co-management model has been advocated by the IUCN as warranting promotion.[215] As illustrated by the recent domestic publication of the *National Co-Management Framework*, co-management also

[211] For a discussion of this element, see Chapter 3 (Part 4.7).
[212] While one of the members of the Bhangazi Community Trust does sit on the Board of the Isimangaliso Wetland Park Authority, this does not constitute co-management.
[213] For a discussion of the prerequisites for successful co-management, see Chapter 3 (Part 4.7).
[214] See generally: Steenkamp et al *The Makuleke Land Claim* (2000); and De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) HSRC Press Pretoria.
[215] For a discussion on the IUCN's promotion of shared governance, see Chapter 2 (Part 3.3.2.2).

appears to be the model favoured by domestic policy-makers for bridging the conservation and land reform divide.[216]

Notwithstanding its international and domestic recognition, local scholars have identified several challenges inherent in the domestic implementation of the co-management model.[217] From a theoretical perspective: the model arose to address specific issues in the conservation context and not as a model for bridging the conservation and land reform divide; co-management is founded on improving state legitimacy rather than promoting actual participation; and the domestic version of the model arose to co-opt well capacitated private white landowners to contract their land into protected areas, a very different context to that of seeking to co-opt frequently ill-resourced and ill-capacitated new communal landowners to retain the conservation status of their restored land.[218] From a practical perspective, many of the factors identified as preconditions for successful co-management are notably absent in South Africa, including: appropriate communal institutions; trust between role-players; sufficient protection of local community rights; and realistic economic incentives.[219] The absence of these factors is clearly reflected in the case studies.[220]

It is therefore unclear why the Government continues to advocate co-management as the central model for resolving the conservation and land reform interface, unless in the words of De Koning, it represents 'a camouflage for the continuation of state hegemony' over protected areas.[221] Three additional aspects heighten this concern. First, the continued lack of clarity on the exact nature of the domestic co-management model and

[216] For more information on the *National Co-Management Framework* (2010), see Chapter 7 (Part 2.2).
[217] See generally: De Koning (2009) *Africanus* 7-8; Kepe (2008) *Environmental Management* 314-318; Kepe et al (2005) *International Journal of Biodiversity Science & Management* 13; and Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 1.
[218] De Koning (2009) *Africanus* 8; Kepe (2008) *Environmental Management* 314-315. For a discussion on the theoretical frailties of the co-management model, see Chapter 7 (Part 2.2).
[219] Kepe (2008) *Environmental Management* 311. For further discussion on the practical frailties of the co-management model, see Chapter 7 (Part 2.2).
[220] For a discussion on the lack of appropriate communal institutions and trust within and between these institutions and the conservation authorities, see Chapter 9 (Part 7). For a discussion of the insufficient protection afforded to local community rights, see Chapter 9 (Part 4) and Chapter 9 (Part 8.5). For a discussion of the lack of realistic economic incentives, see Chapter 9 (Parts 9 and 10).
[221] De Koning (2009) *Africanus* 8.

whether it amounts to joint management or mere consultation.[222] Secondly, the unresolved issue of whether the initial co-management arrangements are the first step towards self-management by the CPI, or the perpetually entrenched management model.[223] Thirdly, the desirability of replicating the co-management model throughout South Africa, when the example on which it is founded, namely the Makuleke case study, is failing to deliver its anticipated benefits to the community[224] and has been labelled as financially unsustainable.[225] Steps clearly need to be taken to move away from the blind reliance on the co-management model and to afford greater recognition to the broad array of governance options prescribed in the relevant domestic legal framework.[226]

8.2 MANAGEMENT INSTITUTIONS

Given the apparent historical domestic favouritism shown to the co-management model, it is not surprising that in all but the Bhangazi case study, provision is made for the creation of an institution to regulate the relationship between the relevant conservation authority and the CPI.[227] The names ascribed to these institutions vary significantly and include management planning committees,[228] joint management boards[229] and co-management committees.[230] Irrespective of their name, they all effectively constitute co-management institutions and shall accordingly be referred to as such for the remainder of this analysis.

[222] De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 87-88.
[223] Collins "The Makuleke Conservation and Land Reform Project" (2010) 6; and De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 66.
[224] Spierenburg et al (2008) *Conservation & Society* 87-97; Robins et al (2008) *Development & Change* 53-72; Friedman "Winning Isn't Everything" (2005); Reid (2002) *Human Ecology* 135-155; Ramutsindela (2002) *GeoForum* 15-24; and Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001).
[225] Groenewald Y & Macleod F "Land Claims 'Could Kill Kruger'" (2005) *Mail and Guardian* (18 February). These doubts largely stem from what SANParks officials believe are skewed perceptions on the money to accrue from eco-tourism concessions in the Pafuri area (Reid (2002) *Human Ecology* 144).
[226] For a discussion of these governance options, see Chapter 7 (Part 3.2).
[227] Given that the Bhangazi community opted for compensation as opposed to restitution of their land, it is not surprising that they have little role to play in the management of the protected area.
[228] As in the Richtersveld case study.
[229] As in the Makuleke case study.
[230] As in the Dwesa-Cwebe case study.

The form and function of these co-management institutions differ across the case studies. Their membership is generally drawn from the relevant conservation authority and CPI. Their composition ranges from equal representation[231] to community majority.[232] What is interesting to note is that several stakeholders with potentially key roles to play in the CCAs generally have no representation on these institutions. These stakeholders include other relevant conservation authorities,[233] land reform authorities, local government authorities, traditional leadership structures and concessionaires operating commercial ventures in the CCAs. Some may argue that including representatives from these stakeholders within the co-management institutions would complicate their functioning and potentially skew their agenda. However, their omission, even as observers or advisers, potentially precludes necessary oversight by government authorities, the co-option of traditional leadership structures, and coordination of the stakeholders' respective functions, mandates and agendas. An additional concern relates to the frequent turnover of community representatives on the CPIs. It has been identified as precluding the development of long-term relations between community and conservation representatives and the completion of projects undertaken by them.[234] Steps clearly need to be taken to ensure that membership tenure on these institutions is of a satisfactory duration and that succession planning mechanisms are put in place to preclude a loss of institutional memory and strategic relations.

The functions ascribed to these co-management institutions are very diverse and range from simply drawing up the management plan for the communally-conserved area[235] to theoretically undertaking the day-to-day management of it.[236] Some exercise control

[231] As in the case of the Joint Management Board and the Co-Management Committee operating in the Pafuri Region of the Kruger National Park and the Dwesa-Cwebe Nature Reserve respectively.
[232] As in the case of the Management Planning Committee, comprising of five community members and four SANParks officials, operating in the Richtersveld National Park.
[233] These could include forestry authorities, water authorities, marine and coastal management authorities and agriculture authorities.
[234] In the context of the Richtersveld case study, see: Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 14.
[235] As in the case of the Management Planning Committee of the Richtersveld National Park.
[236] As in the case of the Joint Management Board of the Pafuri Region of the Kruger National Park.

over the budget for the area[237] while others do not.[238] In some instances, the functions of these co-management institutions and the rights and duties allocated to their constituent members, are well defined.[239] In others they are not, which leads to confusion and conflict.[240] In the majority of case studies, the division of powers and responsibilities between the designated management authority and the co-management institution is not entirely clear which raises uncertainty about the latter's legal status.[241] While some of the founding agreements allocate responsibility for day-to-day management to the co-management institution, they often have no legal standing to make decisions in their own right, no control over the budget and in reality can only make recommendations to the designated management authority for implementation.[242] Calls have been made to transform these co-management institutions into decision-making bodies with clearly defined functions so to improve their credibility and functioning.[243]

Given the potential key role these co-management institutions have to play in implementing the new management paradigm, it is somewhat disconcerting to note the few initiatives undertaken during the past decade to improve their functioning. The only initiatives recorded in the surveyed literature relate to the Makuleke case study where the appointment of a full-time operations officer to oversee the functioning of the co-management institution and the creation of a streamlined four member 'executive committee' to run it, are recorded as improving its operation.[244] Given the apparent success of these initiatives, perhaps it would be prudent to replicate them elsewhere.

[237] As in the case of the Co-Management Committee of the Dwesa-Cwebe Nature Reserve that administers control over certain forms of income derived from activities undertaken in the Reserve.
[238] As in the case of the Joint Management Board of the Pafuri Region of the Kruger National Park.
[239] The *Makuleke Settlement Agreement* (1998) is well lauded in this regard (Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 363).
[240] This is perhaps best epitomised by the *Dwesa-Cwebe Settlement Agreement* (2001) and *Community Agreement* (2001) where neither adequately define the role of the Co-Management Committee and the role of its constituent parties. See further: De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 47.
[241] In the case of the Richtersveld case study, Makuleke case study and Dwesa-Cwebe case study, see respectively: Chapter 8 (Part 2.1); Chapter 8 (Part 2.2); and Chapter 8 (Part 2.3).
[242] In the context of the Makuleke case study, see: De Villiers, *People and Parks - Sharing the Benefits* (2008) 77; and De Villiers e al *Land Reform: Trailblazers* (2006) 19-20 & 28.
[243] Ibid.
[244] Collins "The Makuleke Conservation and Land Reform Project" (2010) 5; De Villiers *People and Parks*

A final institutional trend reflected in the case studies is the centralisation of control within two main institutions: the designated management authority, which generally retains control over the area; and the co-management institution, which generally constitutes a consultative and advisory forum. This approach starkly contrasts with the stated ideal of recognising the nested, overlapping and frequently competing nature of communal resource rights; acknowledging issues of scale; decentralising the management function to a range of smaller decision-making units; and providing the mechanisms to enable them to interact with one another.[245] Four main factors would appear to preclude the realisation of such an approach in South Africa. The Apartheid regime has left a legacy of dispersed communities with little connection to one another or the land that they historically occupied. The continued absence of South Africa's communal land tenure regime has compelled communities to divide themselves and their tenure rights artificially into CPAs for the purpose of rural land restitution. The current conservation regime, which generally precludes residence within protected areas, has frustrated the reconnection of communities to their land and their neighbouring communities. Finally, a lack of resources or political will has undermined the creation of such institutions, the decentralisation of authority to them, and the provision of support to build their capacity and foster collaboration between them.

8.3 MANAGEMENT PLANNING

The value inherent in having a comprehensive plan to inform the management of a CCA is beyond reproach.[246] If one surveys the case studies, their approaches to management planning differ somewhat regarding the nature of the management plan and the process leading to its adoption. Comprehensive management plans have been

- *Sharing the Benefits* (2008) 77; and De Villiers et al *Land Reform: Trailblazers* (2006) 19. The role of the Joint Management Board's (JMBs) operations manager, who is jointly funded by the CPA and SANParks, is to: follow up on the JMB's decisions; liaise with SANParks and CPA representatives; publicise the functions of the JMB; and harmonise the functions of the CPA, JMB and SANParks.

[245] For a discussion of these aspects, see Chapter 3 (Part 4.6).

[246] For a discussion of this element, see Chapter 3 (Part 4.7).

developed in both the Makuleke and Richtersveld case studies.[247] Their nature is very similar, with the only clear distinction being that the latter contains detailed provisions regarding the composition, powers and functions of the Joint Management Committee and the community's development rights in the Richtersveld National Park. These aspects were clearly included in the management plan owing to their omission from the original *Richtersveld Contract Park Agreement*, and the inability of this agreement to be amended until 2014. While the desire to provide clarity on these issues is understandable, the use of the management planning process to negotiate them and the management plan to record them does not appear ideal.[248]

In both the above case studies, the management plan was developed by the relevant co-management institutions, which ensured a degree of community participation in their formulation.[249] Some commentators have however argued that provision should also have been made for independent oversight of the management planning process given the potential inherent power imbalances present at the time the plans were formulated and the central role they play in the administration of the areas.[250]

The nature of the process which led to the adoption of the management plans for the Makuleke and Richtersveld case studies appears to have differed substantially, with the former taking a mere two years to finalise, and the latter over ten. One of the key factors contributing to the protracted negotiation of the management plan in the Richtersveld case study was clearly the attempt to use it to remedy the defects of the original *Contract Park Agreement*. Whilst understandable, the desirability of running the Richtersveld National Park for over a decade without an agreed management plan has

[247] For a discussion of the management plans operating in the Richtersveld case study and the Makuleke case study, see respectively: Chapter 8 (Part 2.1) and Chapter 8 (Part 2.2).
[248] The reasons for this are threefold. Firstly, clarity and agreement should ideally be obtained on these aspects prior to the formation of the CCA. Secondly, the inclusion of these aspects in the management planning framework clouds the distinction between the founding agreement/s which prescribe the parties respective rights and obligations, and the management planning framework which should guide the exercise of them. Thirdly, it can cause significant delays in the formulation and adoption of the management planning framework.
[249] In the Makuleke case study this constituted the Joint Management Board; and in the Richtersveld case study the Management Planning Committee.
[250] De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 62.

been criticised in the past.[251] Similar problems continue to undermine the functioning of the Dwesa-Cwebe Nature Reserve, where the continued absence of a formal management plan has compelled the management authority and co-management institution to rely on somewhat nebulous management principles contained in the *Community Agreement* and the *Management Planning Framework* annexed to it. While the inclusion of such management principles in the founding agreement provides an important baseline for the subsequent formulation of a management plan for the area, it would appear undesirable for it to become a substitute for it. Given the central role management plans play in both the management of the CCA and the exercise of access and use rights within it, perhaps it would be prudent to ensure that they are finalised and agreed upon simultaneously with the founding agreements.

8.4 DECISION-MAKING PROCESS

As has been highlighted in the preceding discussion, the majority of the case studies reflect a significant shift in the approach to management, generally from state-centred authority to some form of shared authority. This is largely facilitated through establishing co-management institutions, detailing the powers and functions of these institutions and their constituent members, and prescribing a management-planning framework to guide the exercise of such authority. The decision-making processes characterising these co-management institutions vary from majority vote[252] to consensus accompanied by deadlock breaking mechanisms.[253] This approach is clearly in line with international thinking with its promotion of community participation through open and accountable shared decision-making structures. However, notwithstanding the prevalence of these institutions and mechanisms, de facto management authority in several of the case studies does not appear to have changed and reflects the "reformist rhetoric" plaguing many community-based conservation initiatives in Africa.[254]

[251] Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 360.
[252] As in the case of the Co-Management Committee of the Dwesa-Cwebe Nature Reserve.
[253] As in the case of the Joint Management Board of the Pafuri Region of the Kruger National Park.
[254] Roe D & Nelson F "The Origins and Evolution of Community-Based Natural Resource Management in Africa" in Roe D, Nelson F & Sandbrook C (eds) *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (2009) Natural Resource Issues No.18, IIED London, 10.

There is evidence of conservation authorities with superior experience, resources and capacity wielding significant power within the co-management institutions, often to the exclusion of community representatives.[255] Decision-making within several of case studies has been recorded as running along 'highly authoritarian and hierarchical lines'[256] with the role of the co-management institution remaining largely theoretical.[257] Furthermore, there is evidence of conservation authorities using management plans to effectively veto the communities' rights of access, use and development.[258] Some commentators argue that this constitutes an unjustified encroachment on the communities' proprietary rights[259] and others that the conditionality imposed on their rights places them in a situation of dependence as opposed to authority.[260] The above state of affairs has led to growing tensions between the conservation authorities and community representatives on many of the co-management institutions.[261] These problems are even evident where the community has a majority on the co-management institution.[262]

Several factors identified as contributing to the current problematic state of affairs can be elicited from recent research undertaken in the case study areas. The first is the apparent fundamental misconception among many conservation authorities that co-

[255] In the context of the Makuleke case study, see: Friedman "Winning Isn't Everything" (2005) 48.
[256] In the context of the Dwesa-Cwebe case study, see: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 11; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 49.
[257] In the context of the Makuleke case study, see: Robins et al (2008) *Development and Change* 67; Friedman "Winning Isn't Everything" (2005) 36 & 47; and Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001) 7. In the context of the Dwesa-Cwebe case study, see: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 44 & 49-50. In the context of the Richtersveld case study see: Kepe et al (2005) *International Journal of Biodiversity Science & Management* 13; and Turner et al *Community-Based Natural Resource Management* (2002) 45.
[258] In the context of the Makuleke case study, see: Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001) 4-5.
[259] De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 67.
[260] Spierenburg et al (2008) *Conservation & Society* 92-95.
[261] See generally: De Koning (2009) *Africanus* 16. In the context of the Dwesa-Cwebe case study, see: Kepe (2008) *Environmental Management* 317. In the context of the Makuleke case study, see: Robins et al (2008) *Development & Change* 67.
[262] In the context of the Richtersveld case study, see: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 360; and Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 11.

management amounts to mere consultation and not joint decision-making.[263] The second is the failure of the parties to clarify the exact nature of the co-management arrangement in the CCA's founding agreements.[264] The third is the hesitancy of particularly lower ranked conservation officials to relinquish management authority to the co-management institutions owing to perceived doubts about the management capabilities of community members.[265] The fourth is the failure of relevant government authorities to clearly delineate their mandates causing confusion as to who is the competent authority for managing the CCA and who should accordingly represent the conservation authorities on the co-management institution.[266] The fifth is the lack of post-settlement support for building and sustaining the capacity of CPIs, which undermines both their internal functioning[267] and their ability to play a meaningful role in the co-management institutions.[268] The sixth is the failure to properly take into account and adequately compensate community members for the opportunity costs associated with their participation in these institutions. This has in certain areas led to their passive participation or absence in order to reduce such costs.[269] In others, it has led to the community overtly frustrating the management of the CCA, through for instance delaying the preparation and approval of the area's management plan.[270]

Problems have also been recorded regarding the process for selecting which community representatives sit on the co-management institutions; and once selected,

[263] De Koning (2009) *Africanus* 16.
[264] In the context of the Dwesa-Cwebe case study, see: De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 47.
[265] In the context of the Makuleke case study, see: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 364; Reid (2002) *Human Ecology* 144; and Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001) 5.
[266] In the context of the Dwesa-Cwebe case study, see: De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 55-57 & 64.
[267] For further discussion on this issue, see Chapter 9 (Part 7.2).
[268] In the context of the Dwesa-Cwebe case study, see: Palmer *From Title to Entitlement* (2003) 10; and Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 262.
[269] In the context of the Dwesa-Cwebe case study, see: Fabricius "Conservation and Communities" in R Palmer et al *From Conflict to Negotiation* (2002) 271.
[270] In the context of the Richtersveld case study, see: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 361; Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 120; and Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 14.

the lack of transparency and accountability in the exercise of their duties.[271] Their failure to communicate and provide feedback to their constituent communities, predominantly as a result of resource and capacity constraints, has fuelled distrust between not only the community and its representatives on the co-management institution, but on occasion the entire co-management institution itself.[272] These problems again raise questions regarding the 'simplistic assumptions of "community" as harmonious, representative, democratic and equitable institutions'.[273] Care therefore clearly has to be exercised in selecting appropriate community representatives to sit on these co-management institutions, and to ensure that mechanisms are put in place to facilitate communication between them and their constituencies.

The above discussion predominantly relates to decision-making within the borders of CCAs. It must be recognised, however, that the management of these areas increasingly involves 'a clash of local, regional, national and even international interests'.[274] This is particularly the case where the area is linked to a neighbouring protected area or incorporated with a transboundary conservation initiative. This latter trait currently characterises the Makuleke and Richtersveld case studies in particular, where the areas supposedly co-managed by the community have been incorporated in transfrontier parks. What is concerning in this regard is the failure of the conservation authorities to engage the communities on the establishment of these transfrontier parks and to include community representation on the management institutions responsible for their administration, notwithstanding the fact that the communities 'own' significant portions of land incorporated within them.[275] Concerns have also been raised about the

[271] In the context of the Dwesa-Cwebe case study, see: Kepe (2008) *Environmental Management* 317. In the context of the Richtersveld case study, see: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 360-361; Magome et al "Sharing South African National Parks" in W Adams et al (eds) *Decolonizing Nature* (2003) 120; Turner et al *Community-Based Natural Resource Management* (2002) 45; Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 11 & 14; and Boonzaier E "Negotiating the Development of Tourism in the Richtersveld, South Africa" in Price M (ed) *People and Tourism in Fragile Environments* (1996) John Wiley & Sons Limited Chichester 130. In the context of the Bhangazi case study, see: Walker *Land-Marked* (2008) 139.
[272] Ibid.
[273] Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 136.
[274] Walker *Land-Marked* (2008) 110.
[275] In the case of the Makuleke case study, see: Grossman et al "Towards Transformation" in Suich

failure of conservation authorities to consult CPIs over the sourcing and allocation of financial grants for these transfrontier parks.[276] This selective engagement of communities on key issues impacting on the CCAs has led some commentators to view these transfrontier park initiatives as deliberate attempts to circumvent local community participation in conservation.[277]

There are clearly significant challenges facing the realisation of the objects of South Africa's contemporary conservation regime that seeks to promote greater community participation in the decision-making structures and processes governing CCAs. Whilst the case studies illustrate recognition by conservation authorities of the need to transform their outdated approach to conservation and improve their communication with communities,[278] the practical realisation of this transformation remains superficial.[279] If one considers the cumulative experience reflected in the case studies, it appears to mimic Murphree's identified frailties inherent in many 'people and parks' type programmes where the government authorities refuse to 'surrender the power and control of access to resources essential for robust devolution'.[280] It has been recognised that the implementation of a collaborative and participatory form of management is a

Evolution and Innovation (2009) 364; Robins et al (2008) *Development & Change* 67; Spierenburg et al (2008) *Conservation & Society* 89-90; Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007) 30 & 47; Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing* (2003) 123-124 & 126-127; and Katerere Y, Hill R & Moyo S *A Critique of Transboundary Natural Resource Management in Southern Africa* (2001) *Series on Transboundary Natural Resource Management Paper No.1*, IUCN-ROSA Harare. In the case of the Richtersveld case study, see: Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 124-125 & 126-127.

[276] Take for instance the Makuleke case study, where SANParks failed to discuss the use of the R40m grant allocated to the Kruger National Park to development of the Great Limpopo Transfrontier Conservation Area (Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 364.

[277] Spierenburg et al (2008) *Conservation & Society* 89-90; Ramutsindela M *Transfrontier Conservation in Africa: At the Confluence of Capital, Politics and Nature* (2007) CAB International Wallingford 105-113; Chapin M "A Challenge to Conservationists" (2004) 17(6) *World Watch* 17-31; and Dzingirai V *Disenfranchisement at Large: Transfrontier Zones, Conservation and Local Livelihoods* (2004) IUCN-ROSA Harare 8.

[278] Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 840-841.

[279] Turner et al *Community-Based Natural Resource Management* (2002) 11.

[280] Martin R "Murphree's Laws and Principles, Rule and Definitions" in Mukamuri B, Manjengwa J & Anstey S (eds) *Beyond Proprietorship - Murphree's Laws on Community-Based Natural Resource Management in Southern Africa* (2009) Weaver Press Harare 17.

'long and continuously evolving process'.[281] Its implementation in South Africa is in its relative infancy, but conservation authorities would do well to regularly heed the warning of one domestic commentator, that the 'persistence of a patronistic, hegemonic approach is ultimately self-defeating'.[282]

8.5 DE FACTO MANAGEMENT

In addition to the above problems associated with the management institutions, planning frameworks and decision-making processes, the case studies highlight several additional practical challenges that impact on the de facto management of CCAs.

The first key challenge stems from the legislative and institutional fragmentation that continues to confound South Africa's conservation regime.[283] This is epitomised in the Dwesa-Cwebe case study where the delegation and/or assignment of responsibility from one entity to another has diluted understanding of the tenor underpinning the *Settlement Agreement* and *Community Agreement*; led to confusion regarding who is the competent authority for the Reserve; confounded the membership of the Reserve's co-management committee; and undermined the ideal of regulating the terrestrial and marine components of the Reserve as a single unit.[284]

The second challenge is the apparent assumption that the parties to the founding agreements have the requisite capacity, resources and political will to fulfil their management obligations. There is evidence in several of the case studies of the designated management authority failing to fulfil its management obligations prescribed in the agreement.[285] As highlighted above, this is frequently a result of the vague

[281] Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 841.
[282] Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001) 7.
[283] For a discussion of this fragmentation and the recent steps that have been undertaken to overcome it, see Chapter 7 (Part 1).
[284] Eastern Cape Parks Board *Draft Integrated Reserve Management Plan: Strategic Management Plan: Dwesa-Cwebe Nature Reserve*, dated 6 December 2006, 17; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 55-56 & 64.
[285] In the context of the Richtersveld case study, see: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 361; and Boonzaier E "Local Responses to Conservation in the Richtersveld National Park, South Africa" (1996) 5 *Biodiversity & Conservation* 312. In the context of the

formulation of the parties' respective management functions in the underlying agreement.[286] The challenge is compounded in certain of the case studies by the equally vague and often inequitably formulated provisions for holding defaulting parties to account and for resolving disputes.[287] Fortunately, this challenge is partly mitigated by the range of mechanisms contained in the contemporary conservation regime that are specifically designed to promote the performance and accountability of such management authorities.[288]

The failure of existing management authorities to fulfil their management mandates has resulted on occasion in the appointment of third parties to undertake management functions in CCAs. This is perhaps best epitomised in the Makuleke case study where one of the concessionaires running a private lodge in the Pafuri Region, employed a private security company to curb rhino poaching in the area.[289] The initiative appears to have provided an effective stop-gap solution to curb poaching and ultimately led to the management authority recently reassuming its responsibilities in the apparent face of competition.[290] Given the budgetary constraints faced by many domestic conservation authorities,[291] such initiatives may provide a workable model for sharing management costs with concessionaires whose economic returns are dependent on the effective management of the area. Important lessons can however be learnt from the controversy associated with the above initiative.[292] The first is the need to consider including

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Makuleke case study, see: Collins "The Makuleke Conservation and Land Reform Project" (2010) 1-2; and Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 364. In the context of the Dwesa-Cwebe case study, see: De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 55-56 & 64; and *Draft Integrated Reserve Management Plan* (2006) 17.

[286] For a discussion of this issue, see Chapter 9 (Part 5.2).

[287] In the context of the Dwesa-Cwebe case study, see: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 43. For a further discussion of the dispute resolution procedures contained in the agreements underpinning the four case studies, see Chapter 9 (Part 5.2).

[288] For further information on these mechanisms, see Chapter 5 (Part 3.1.2).

[289] See generally: De Villiers *People and Parks - Sharing the Benefits* (2008) 78; and Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007) 28.

[290] The private security company's services were terminated in May 2010. SANParks now employ the rangers who used to work for the private security company and they fulfil their same functions in the Pafuri Region of the Kruger National Park (Collins "The Makuleke Conservation and Land Reform Project" (2010) 6).

[291] For a discussion on these financial constraints, see Chapter 5 (Part 2).

[292] The initiative caused significant tension between the private security company and SANParks, who claimed that their appointment and operation within the Pafuri Region of the Kruger National Park was illegal. It also caused significant tensions between the private security company and the communities

concessionaires as parties to the co-management institutions in order to give credence to the key role they frequently play in the de facto management of CCAs. This should ideally be in an advisory capacity so as to not unduly skew the power relations between the conservation authorities and community representatives on the co-management institutions. Interestingly, the conservation authorities in the Makuleke case study continue to preclude the participation of concessionaires, notwithstanding calls from the community for them to be afforded an observer status at Joint Management Board meetings.[293] The second is the need to consult with the management authority prior to commissioning third parties to undertake management functions in the CCA. The third is the need to define the geographical scope and nature of their functions and authority clearly.

The final challenge reflected in the case studies which impacts on the de facto management of CCAs relates to the role of traditional knowledge and management practices in conservation. If one surveys the founding agreements of all four case studies and the planning frameworks that inform their management, they are predominantly founded within a westernised scientific discourse. They accordingly afford very little recognition to the significant historic and future role traditional knowledge and management practices have and can play in conserving the resources situated in CCAs. This is clearly at odds with the contemporary international conservation discourse that seeks to promote their recognition and use.[294] Tensions have been recorded in certain of the case studies between scientific knowledge and traditional knowledge specifically relating to the state of natural resources and management practices.[295] These tensions will hopefully compel domestic policy-makers to rethink their current blinkered and out-dated approach.

surrounding the Park who claimed that the former did not have authority in those regions of the Matshakatini Nature Reserve that were still subject to a land claims dispute between the Gumbu-Mutele Community and the Makuleke Community. See further: Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007) 28 & 31.

[293] Collins "The Makuleke Conservation and Land Reform Project" (2010) 5.

[294] For a discussion of this contemporary international discourse, see Chapter 3 (Parts 3.2 and 4.7).

[295] In the context of the Dwesa-Cwebe case study, see: Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 262.

9. ACCESS, USE AND BENEFIT-SHARING

The fragility of an approach that seeks to promote conservation without simultaneously providing communities with appropriate access, use and benefit-sharing opportunities within the CCA has been noted previously in this dissertation.[296] This issue is highly relevant in the South African context where the majority of rural communities situated within or adjacent to CCAs are 'locked in a cycle of poverty' and for which 'the cost-benefit analysis between having land for farming and grazing or for conservation is a matter of survival'.[297] The negotiations preceding the formation of these CCAs therefore need to acknowledge these realities and ensure that tangible and intangible benefits accrue to communities.[298] These benefits should ideally be shown to outweigh those that could accrue through alternative land uses and the failure to realise such benefits may lead to CCAs becoming the 'victim of competition from other land-use options'.[299]

As highlighted by the diverse forms of access, use and benefit-sharing schemes prevalent in the four case studies, domestic policy-makers appear to have taken the above to heart. The schemes include provision for both tangible benefits[300] and intangible benefits.[301] They differ not only in nature but degree, with the rights of access and use in some of the case studies being far more extensive than in others.[302] This would appear to provide some evidence of the stakeholders involved in the formation of

[296] For a discussion of this element, see Chapter 3 (Part 4.8).
[297] De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 80-81.
[298] Ibid.
[299] De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 96; Turner et al *Community-Based Natural Resource Management* (2002) 15-16.
[300] Tangible benefits reflected in the founding agreements of the case studies include: residence rights; grazing rights; harvesting rights; development and commercial rights (predominantly relating to hunting and lodge concessions); employment benefits; financial benefits (predominantly comprising of compensation; settlement grants; rental and tourism levies); capacity and training benefits; and the grant of alternative land.
[301] Intangible benefits reflected in the founding agreements of the case studies include: the recognition and protection of sites of cultural, spiritual and cultural importance; and the grant of access rights to communities to undertake spiritual and cultural rituals and ceremonies.
[302] The rights of access and use in the Richtersveld case study are, for example, far more extensive than those in the Makuleke case study and Dwesa-Cwebe case study. The least extensive rights of access and use are not surprisingly evident in the Bhangazi case study, given that the community forwent restoration of their land in favour of compensation. See in this regard the discussion of the four case studies in Chapter 8.

these areas seeking to tailor the schemes to suit their needs and the specificity of the area. Several key factors appear to have influenced the negotiation and shape of these schemes, such as: the nature, resources and capacity of the community; the presence or absence of external support for the community; the strength of the communities' tenure rights preceding the negotiations; and the nature of the land restitutions settlement option chosen by them.[303]

Notwithstanding the recordal of apparently diverse access, use and benefit-sharing schemes in the majority of the case studies' founding agreements, several challenges have on occasion thwarted their realisation. These challenges relate to the negotiation process through which the schemes arose, their nature and form, their implementation and the distribution of rights and benefits accruing from them.

9.1 NEGOTIATION PROCESS

In the majority of case studies, the relevant access, use and benefit-sharing scheme was negotiated prior to the establishment of the area and recorded in the founding agreement. This would appear to be in line with the approach advocated by international scholars.[304] The Richtersveld case study is, however, a notable exception. The failure of the stakeholders to canvas the community's commercial development rights in the Richtersveld National Park prior to its formation, coupled with their inability to amend the founding agreement until 2014, compelled them to record such rights within the Park's management plan.[305] As highlighted above, this is not an ideal approach and reiterates the need to provide for the periodic review and amendment of the founding agreements to enable them to adapt the schemes to changing circumstances.[306]

[303] For a discussion on these factors and their influence on the negotiation process, see Chapter 9 (Part 5.1).
[304] For a discussion on this issue, see Chapter 3 (Part 4.8).
[305] For a discussion on this issue, see Chapter 9 (Part 8.3).
[306] Ibid.

A further challenge relates to the skewed and unrealistic expectations often created during the negotiation of the schemes.[307] The failure of the promised and often unrealisable rights and benefits to materialise has led to frustration and conflict in several of the case studies.[308] Realism clearly needs to permeate the negotiation process from the outset. Such realism could be facilitated through conducting feasibility studies to inform the selection of appropriate, viable and long-term rights and benefits.[309] It could furthermore be facilitated by reinforcing the following general realities relating to protected areas during the negotiation process: ownership of the area will not necessarily lead to the resolution of the economic and social ills prevalent in and around it;[310] restitution is not in itself a panacea for rural development;[311] providing access to and development opportunities within the area cannot alone facilitate rural development within and adjacent to it;[312] and relying on a single strategy for promoting rural development may ultimately undermine the livelihoods of groups living within or adjacent to it, thereby fuelling conflict and instability.[313] While the access, use and benefit-sharing schemes associated with CCAs can contribute towards sustaining rural livelihoods and alleviating poverty, the parties should ideally seek to

[307] Kepe (2008) *Environmental Management* 317; and Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 838.

[308] Take for instance the Makuleke case study, where the anticipated lucrative benefits associated with the three concession lodges established in the Pafuri Region have not been forthcoming and the income generated from them is yet sufficient to cover the running costs of the Makuleke CPA. See in this regard: Collins "The Makuleke Conservation and Land Reform Project" (2010) 1-2; Friedman "Winning Isn't Everything" (2005) 48 & 50-53; and Turner et al *Community-Based Natural Resource Management* (2002) 13. In the context of the Dwesa-Cwebe case study see: Fay "Property, Subjection and Protected Areas" in Fay et al *The Rights and Wrongs of Land Restitution* (2009) 25-27 & 36; Hall *The Impact of Land Restitution and Land Reform on Livelihoods* (2007) 11; and Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 37-39 & 54. In the context of the Richtersveld case study, see: Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 14; and Boonzaier (1996) *Biodiversity & Conservation* 311-313. In the context of the Bhangazi case study, see: Department of Environmental Affairs *Conservation for the People with the People - A Review of the People and Parks Programme* (2010) 50; and Isimangaliso Wetland Park Authority *Isimangaliso Wetland Park Integrated Management Plan* (2008) 63.

[309] Wynberg et al (2007) *Journal of Environmental Planning & Management* 793-799; and Turner et al *Community-Based Natural Resource Management* (2002) 8.

[310] De Villiers *People and Parks - Sharing the Benefits* (2008) 84; and Hall *The Impact of Land Restitution and Land Reform on Livelihoods* (2007) 11-12.

[311] Fay D & James D "Giving Land Back or Righting Wrongs? - Comparative Issues in the Study of Land Restitution" in Walker C, Bohlin A, Hall R & Kepe T *Land, Memory, Reconstruction and Justice - Perspectives on Land Claims in South Africa* (2010) Ohio University Press Ohio 55.

[312] Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 268.

[313] Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007) 44-45.

integrate these schemes within a far more holistic approach to rural development, one preferably led by local government.[314]

9.2 NATURE AND FORM OF THE RIGHTS AND BENEFITS

While there is evidence of a diverse array of access, use and benefit-sharing schemes in operation in the case studies, several commentators have argued that their ambit is still too narrow in formulation, particularly regarding eco-tourism opportunities provided by the CCAs.[315] Criticism has specifically been levelled at the heavy reliance placed on concession lodges as the preferred eco-tourism model.[316] This criticism stems from the high-capital costs associated with their construction; the often unfavourable terms on which the communities enter into the agreements with the lodge concessionaires;[317] the lack of control the communities exercise over the lodge concessionaires' performance;[318] the propensity of the lodge concessionaires to preclude other

[314] De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 83; Chellan N & Khan S "Contesting Ecotourism Development in the Isimangaliso Wetland Park in Kwazulu-Natal" (2008) 15(1) *Alternation* 274; Walker *Land-Marked* (2008) 140; Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007) 44-45; and Kepe et al (2005) *International Journal of Biodiversity Science & Management* 14.

[315] Kepe (2008) *Environmental Management* 317. In the context of the Dwesa-Cwebe case study, see: Palmer R, Fay D, Timmermans H & Fabricius C "A Development Vision for Dwesa-Cwebe" in Palmer et al *From Conflict to Negotiation* (2002) 283-289.

[316] See generally: Hall *The Impact of Land Restitution and Land Reform on Livelihoods* (2007) 17; Fakir S *Globalisation and its Influence on Poverty and Environment* (2004) Policy Think Tank Series No.17, IUCN-ROSA Harare; and Dzingirai (2003) *Development & Change* 243-263. In the context of the Makuleke case study, see: De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 91-96; and Spierenburg et al (2008) *Conservation & Society* 89-90 & 92-93. In the context of the Dwesa-Cwebe case study, see: Palmer et al "A Development Vision for Dwesa-Cwebe" in Palmer et al *From Conflict to Negotiation* (2002) 283-289.

[317] Take for instance the Makuleke case study where the following aspects of the concession agreements concluded between Wilderness Safaris (Pty) Ltd and the Makuleke CPA have been identified as operating in the concessionaires favour: the long duration of the agreement; the lack of performance criteria to regulate the concessionaire's performance; and the absence of a clause enabling the concessionary to withdraw from the agreement if it proves unprofitable. See further: Collins "The Makuleke Conservation and Land Reform Project" (2010) 8; Spierenburg et al "Transfrontier Tourism and Relations between Local Communities and the Private Sector" in Hottola *Tourism Strategies and Local Responses in Southern Africa* (2009) 176; and Spierenburg et al (2008) *Conservation & Society* 92-93.

[318] Take for instance the Makuleke case study, where the lodge concession agreements link the economic return to the community to the concessionaires' turnover, in respect of which the community has no control. See further: Collins "The Makuleke Conservation and Land Reform Project" (2010) 7; and Fabricius C & Collins S "Community-Based Natural Resource Management: Governing the Commons' (2007) 9(2) *Water Policy* 88.

conflicting but potentially more lucrative forms of commercial concessions;[319] the long-term nature of the anticipated economic returns for the community; and the danger inherent in outsourcing all profitable ventures to lodge concessionaires with no associated obligation being placed on them to contribute to the management costs associated with the CCA.[320] These problems could be mitigated by providing support to the communities in their dealings with commercial operators; providing for some form of public oversight of the negotiation process; fostering realism regarding the nature and anticipated returns from the concession agreements; ensuring that concessionaires contribute to the costs of managing the area; and diversifying the range of eco-tourism enterprises undertaken in the CCA.

Owing to the challenges associated with concession lodges, domestic commentators have called for greater emphasis to be placed on small community-based enterprises that often require low capital investment.[321] These would include locally driven cultural and heritage tourism-related activities.[322] Given the often erratic nature of the economic returns associated with eco-tourism ventures, other commentators advocate the

[319] Take for instance the Makuleke case study where further hunting concessions, recorded as providing far greater and immediate financial returns to the community than the lodge concessions, are currently precluded by the exclusivity over the area granted to the lodge concessionaires. See further: Collins "The Makuleke Conservation and Land Reform Project" (2010) 1-2; Whande *Trans-boundary Natural Resource Management in Southern Africa* (2007); and Friedman "Winning Isn't Everything" (2005) 41.

[320] See generally: Collins "The Makuleke Conservation and Land Reform Project" (2010) 1-2; De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 85; De Villiers *People and Parks - Sharing the Benefits* (2008) 83; De Villiers et al *Land Reform: Trailblazers* (2006) 28; Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 838 & 840-842; and Clarke J "Trends in Forest Ownership, Forest Resources Tenure and Institutional Arrangement: Are they Contributing to Better Forest Management and Poverty Reduction? A Case Study from South Africa" Undated Research Report Prepared for Food and Agriculture Organisation (Forestry Department) (available at www.fao.org/forestry/12503-1-28.pdf) 9.

[321] The following activities and functions could be outsourced to local community service providers: entertainment, music and theatre; maintenance of infrastructure, roads and fences; open-access drives; hop-on guides; car washing; laundry; interior decorating; catering; vegetable and fruit gardens; staff transportation; environmental training and education; firewood collection; refuse removal; and curio and refreshment shops. In the context of the Makuleke case study, see: De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 91-96.

[322] Cultural and heritage tourism-related activities could include: watching traditional natural resource extraction; homestead visits; attending local horse races; attending stick fights; attending traditional beer drinks; and consulting traditional diviners and herbalists. In the context of the Dwesa-Cwebe case study, see: Palmer et al "A Development Vision for Dwesa-Cwebe" in Palmer et al *From Conflict to Negotiation* (2002) 293-300.

resumption of traditional land use practices[323] within and adjacent to the CCA, thereby ensuring the resilience of community livelihoods.[324] Furthermore, calls have been made to acknowledge the significant indirect benefits often associated with the establishment of CCAs, such as: increased employment; improved municipal infrastructure and services; education and training; institutional development; and social empowerment.[325] Several of these indirect benefits have been noted in the case studies.[326]

Finally, one major yet largely untapped source of benefits in the context of South Africa's CCAs, stem from the global climate change regime prescribed under the *United Nations Framework Convention on Climate Change*,[327] read together with the *Kyoto Protocol*.[328] Given the key potential role protected areas can play in climate change mitigation,[329] opportunities arise for tapping into the potentially lucrative climate change incentive schemes, most notably those associated with the Reduced Emissions from Deforestation and Forest Degradation (REDD) Mechanism and its REDD Plus counterpart.[330] These mechanisms feasibly provide a vital tool for providing significant

[323] These would include residence, fishing, hunting, subsistence agriculture and grazing.
[324] In the context of the Richtersveld case study, see: Cousins B, Hoffman M, Allsopp N & Rohde R "A Synthesis of Sociological and Biological Perspectives on Sustainable Land Use in Namaqualand" (2007) 70 *Journal of Arid Environments* 839 & 841-843. In the context of the Makuleke case study, see: De Villiers et al *Land Reform: Trailblazers* (2006) 28; Friedman "Winning Isn't Everything" (2005) 42; and Reid (2002) *Human Ecology* 144.
[325] Turner et al *Community-Based Natural Resource Management* (2002) 8; and Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 270.
[326] Take for instance the Makuleke and Richtersveld case studies where the establishment of the CCAs has been recorded as leading to the institutional and social empowerment of the communities and the reinvigoration of their cultural identity. In the context of the Makuleke case study, see: Turner et al *Community-Based Natural Resource Management* (2002) 8. In the context of the Richtersveld case study, see: Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 14; and Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 133-136.
[327] (1992) 31 *ILM* 849.
[328] (1998) 37 *ILM* 22.
[329] See generally on the link between protected areas and climate change: Dudley N, Stolton S, Belokurov A, Krueger L, Lopoukhine N, MacKinnon K, Sandwith T & Sekhran N (eds) *Natural Solutions: Protected Areas Helping People Cope with Climate Change* (2010) IUCN-WCPA, TNC, UNDP, WCS, World Bank & WWF; Gland, Washington DC & New York; and Secretariat of the Convention on Biological Diversity *Biodiversity and Climate Change* (2007) IUCN & UNEP WCMC.
[330] A full discussion of these mechanisms unfortunately falls out the purview of the dissertation. For further discussion, see Dudley et al *Natural Solutions* (2010) 78-86; and Gomera M, Rihoy L & Nelson F "A Changing Climate for Community Resource Governance: Threats Opportunities from Climate Change and the Emerging Carbon Market" in Nelson F (ed) *Community Rights, Conservation and Contested Land - The Politics of Natural Resource Governance in Africa* (2010) Earthscan London 293-307.

tangible benefits to local communities and potentially aiding in ensuring the financial sustainability of CCAs.

9.3 IMPLEMENTATION

Notwithstanding the inclusion of fairly extensive access, use and benefit-sharing schemes in the founding agreements, there is evidence in some of the case studies of conservation authorities simply not honouring their undertakings.[331] The implementation of the schemes is further confounded by the lack of clarity characterising many of the access and use rights.[332] Furthermore, even where such rights are relatively clearly defined in the founding agreements, their exercise is often subject to unduly stringent conditions[333] and often the prior approval of the management authority.[334] This has effectively placed several communities 'at the mercy of conservation agencies who tend to pursue conservation goals and the prevention of the consumptive use of natural resources at all costs'.[335]

[331] This is perhaps best epitomised in the Bhangazi case study, where the erstwhile Department of Land Affairs failed to assist certain members of the claimant community to purchase alternative land; and the Isimangaliso Wetland Park Authority is yet to designate the community's heritage site on the shores of Lake Bhangazi (Walker *Land-Marked* (2008) 138-139).

[332] Take for instance the Dwesa-Cwebe case study, where the vague formulation of the access and use rights has been recorded as undermining the community's ability to access and harvest resources of significant bio-cultural importance that are situated in the Reserve. See in this regard: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 20 & 44; and Timmermans H "Natural Resource Use at Dwesa-Cwebe" in Palmer et al *From Conflict to Negotiation* (2002) 173-198. Similar problems have been recorded in the context of the Richtersveld case study, particularly around grazing rights and how many tourists should be granted access to the Park (Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 130-131).

[333] Take for instance the Richtersveld case study, where only 12 tourist vehicles are allowed in the Richtersveld per day. See in this regard: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 361; Boonzaier (1996) *Biodiversity & Conservation* 312; and Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 131-132.

[334] Take for instance the Makuleke case study, where the conservation authorities are recorded as attempting to stop, apparently without any clear conservation rationale, the Makuleke CPA authorising two commercial hunting safaris and the establishment of a 24-bed lodge in the Pafuri Region of the Kruger National Park in 2001. See in this regard: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 363-364; Spierenburg et al (2008) *Conservation and Society* 92; Robins et al (2008) *Development & Change* 67; Friedman "Winning Isn't Everything" (2005) 44, 48 & 50-53; and Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001) 4-5 & 7.

[335] Kepe et al (2005) *International Journal of Biodiversity Science & Management* 13. See further: Wynberg et al (2007) *Journal of Environmental Planning & Management* 792; and Magome et al "Sharing South African National Parks" in Adams et al *Decolonizing Nature* (2003) 131.

Several additional practical challenges undermine the implementation of the access, use and benefit-sharing schemes. The lack of cooperative governance between conservation authorities has frustrated the realisation of the anticipated benefits flowing from eco-tourism in certain areas.[336] The lack of capacity and resources of some communities has undermined their ability to take effective advantage of the access, use and development rights recorded in the founding agreements.[337] The slow transfer of title deeds to successful claimant communities has precluded the ability of certain communities to secure finance and enter into commercial partnerships with private operators.[338] Finally, the improper regulation of commercial operators undertaking lucrative commercial ventures within or immediately adjacent to the CCA has on occasion precluded the flow of benefits to the community.[339]

As cautioned by several domestic scholars, a failure to address the above challenges undermining the implementation of certain schemes may marginalise the communities on which the 'social and political sustainability of conservation' often depends.[340] It may furthermore result in South Africa's CCAs becoming 'new rural dumping grounds, differing from their apartheid predecessors in that their poverty stricken inhabitants own their land'.[341]

[336] Take for instance the Dwesa-Cwebe case study, where the lack of cooperative governance between the terrestrial and marine conservation authorities regarding fishing rights has led to the 'still-birth' of eco-tourism' in the Reserve. See in this regard: Fay "Property, Subjection and Protected Areas" in Fay et al *The Rights and Wrongs of Land Restitution* (2009) 36; and Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 54.

[337] Take for instance the Makuleke case study, where the community lacks transportation to or from the Pafuri Region of the Kruger National Park to enable them to exercise their access and use rights (Friedman "Winning Isn't Everything" (2005) 44). Furthermore, take for instance the Dwesa-Cwebe case study, where the community's lack of capacity has been recorded as undermining their ability to realise their 'environmental entitlements' in the Reserve (Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 259 & 262). On 'environmental entitlements', see generally: Leach M, Mearns R & Scoones I "Environmental Entitlements: Dynamics and Institutions in Community-Based Natural Resource Management" (1999) 27(2) *World Development* 225-247.

[338] *Conservation for the People with the People* (2010) 36.

[339] Take for instance the Richtersveld case study, where several private operators run commercial rafting ventures on the Orange River immediately abutting the Richtersveld National Park, and return no form of benefits to the community. See further: Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 132; and Boonzaier (1996) *Biodiversity & Conservation* 311-312.

[340] Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001) 7.

[341] Turner et al *Land and Agrarian Reform in South Africa* (2000) 13

9.4 DISTRIBUTION

While ensuring the flow of direct benefits from the CCA to the community no doubt reinforces their support for it,[342] a 'sudden rush of benefits can be particularly disruptive to community cohesion' particularly in poor historically disempowered communities.[343] This problem is compounded where there is an absence of strong, well-capacitated, open and transparent institutions to ensure the equitable distribution of benefits to the local community.[344] The general challenges inherent in the functioning of the CPIs to which such benefits are allocated have been canvassed above.[345] Several problems regarding the distribution of benefits by these institutions are specifically noted in the case studies. There have been protracted delays in the CPIs to which economic benefits generally accrue, spending them for the general benefit of the community.[346] Certain of the access and use rights allocated to the institutions have been monopolised by influential members of the community.[347] Finally, decisions regarding who constitute beneficiaries and the allocation of the benefits between them have on occasion led to intra-community and inter-community conflicts.[348]

There is clearly a need to think strategically about: how best to ensure the equitable, transparent and accountable distribution of rights and benefits where they are not

[342] Turner et al *Community-Based Natural Resource Management* (2002) 19.
[343] Fabricius "Conservation and Communities" in Palmer et al (eds) *From Conflict to Negotiation* (2002) 267-268.
[344] Kepe (2008) *Environmental Management* 317.
[345] See Chapter 9 (Part 7.2).
[346] Take for instance the Bhangazi case study, where there have been significant delays in the spending of the resources accruing to Bhangazi Community Trust through the tourism levy. See further in this regard: Larsson-Lidén "For Whom is the Isimangaliso World Heritage Site" (2007) 10; and Walker (2005) *Transformation: Critical Perspectives on Southern Africa* 20.
[347] Take for instance the Richtersveld case study, where the grazing rights allocated to the community are effectively held by six influential members of the community. See further: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 360-361; and Boonzaier "Negotiating the Development of Tourism in the Richtersveld" in Price *People and Tourism in Fragile Environments* (1996) 130.
[348] Take for instance the Bhangazi case study, where the payout of settlement benefits was recorded as 'socially destabilising, rousing antagonistic expectations of compensation beyond those households represented in the agreement' and causing tensions within beneficiary households 'as to who would receive the money and how it should be spent' (Walker *Land-Marked* (2008) 138). See further: Kepe et al (2005) *International Journal of Biodiversity Science & Management* 14; and Turner et al *Community-Based Natural Resource Management* (2002) 6.

derived from any tangible community inputs; how best to support those institutions tasked with doing so; and what forms of dispute resolution procedures would be most apt to deal with the inevitable conflict.[349] One favourable example emanating from the case studies is the decision by the Bhangazi community to share a portion of the proceeds generated from the tourism levy in operation in the Isimangaliso Wetland Park with the neighbouring tribal authority.[350] This not only ensures the more equitable allocation of benefits to the broader community who have a vested interest in the Park, but also provides a tool for sweetening the relationship between the new CPIs and their traditional counterparts.

There are clearly several significant challenges facing the realisation of the access, use and benefit-sharing schemes at play in the case studies. What is interesting to note is that the majority of the challenges reflected in the case studies would not appear to stem from the underlying legal regime itself, but rather the political will of the conservation authorities to allow for de facto access, use and development rights within the area, and the capacity of the communities to negotiate and take on such rights. Steps clearly need to be taken to resolve these issues and provide for more extensive yet realistic access, use and benefit-sharing schemes in CCAs. However, as illustrated in several of these case studies, steps should simultaneously be taken to improve compliance monitoring and enforcement.[351] Care should furthermore be taken to ensure that any renewed focus on improving access, use and benefit-sharing in CCAs does not side-line the interest and role of communities in the management of the area.[352]

[349] Kepe et al (2005) *International Journal of Biodiversity Science and Management* 14; and Fabricius, "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 270.
[350] For a discussion of this issue, see Chapter 8 (Part 2.4) .
[351] Take for instance the Dwesa-Cwebe case study, where the lack of direct monitoring, compliance and enforcement has been recorded as contributing to the significant increase in the illegal harvesting of forest and marine resources. See further in this regard: De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 56; Fabricius "Conservation and Communities" in Palmer et al *From Conflict to Negotiation* (2002) 260; and Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 837. Furthermore, take for instance the Richtersveld study where the lack of management oversight has been recorded as leading to overgrazing within the Richtersveld National Park and the degradation of the landscape caused by tourism-related activities (Boonzaier "Negotiating the Development of Tourism in the Richtersveld, South Africa" in Price *People and Tourism in Fragile Environments* (1996) 132.
[352] Reid H, Fig D, Magome H & Leader-Williams N "Co-Management of Contractual National Parks in South Africa: Lessons from Australia" (2004) 2 *Conservation & Society* 379.

10. FINANCING AND SUPPORT

It is the exception rather than the norm that CCAs are financially self-sufficient.[353] This is clearly reflected in the case studies where the management authorities continue to rely heavily on government and foreign agency grants to fund their operations.[354] These grants have not only ensured the financial sustainability of the case studies, but have furthermore provided employment for members of the communities through poverty alleviation schemes such as: *Working for Water*;[355] *Working on Fire*;[356] *Landcare*;[357] and the *Coastcare Programme*.[358] This employment is however of a temporary nature and attention should be paid to improve the skills and capacity of those benefitting from these schemes with a view to securing them long-term employment within the CCAs.[359]

[353] For a discussion of this issue, see Chapter 3 (Part 4.9).

[354] Owing to the unavailability of financial statements on the four specific case studies, the following information has been distilled from the financial statements of the management authorities tasked with their administration. In the context of the Dwesa-Cwebe case study, approximately 90 % (R105 million of R114 million) of the Eastern Cape Parks Board's annual revenue comprised of government grants in 2009 (Eastern Cape Parks Board *Annual Report 2008/2009* (2009) 96). In the context of the Bhangazi case study, approximately 64 % (R32 million of R64 million) of the Isimangaliso Wetland Park Authority's annual revenue comprised of government and foreign donor grants in 2009 (Isimangaliso Wetland Park Authority *Isimangaliso Wetland Park 2008/2009 Annual Report and Financial Statements* (2009) Presentation to Portfolio Committee, dated 4 November 2009). In the context of the Makuleke and Richtersveld case studies, approximately 35 % (R406 million of R1.1 billion) of SANPark's annual revenue comprised of government grants in 2010 (South African National Parks *SANParks Annual Report 2010* (2010) Presentation to Portfolio Committee, dated 10 November 2010).

[355] The *Working for Water Programme*, introduced by the erstwhile Department of Water Affairs and Forestry in 1995, is a government-funded programme that seeks to control and eradicate alien and invasive plant species in South Africa. For further information on the programme, see: http://www.dwaf.gov.za/wfw/.

[356] The *Working on Fire Programme*, launched by four non-profit organisations in 2003, is a government-funded programme that undertakes integrated fire management and veld and wild fire fighting. For further information on the programme, see: http://www.workingonfire.org/.

[357] The *Landcare Programme*, introduced by the erstwhile Department of Agriculture in 1999, is a government funded programme that seeks to promote the conservation of natural resources (soil, water and vegetation). For further information on the programme, see: Department of Agriculture, *Implementation Framework for the Landcare Programme: Discussion Document*, dated February 1999).

[358] The *Coast-Care Programme*, introduced by the erstwhile Department of Environmental Affairs and Tourism, is a government funded programme which seeks to provide jobs and training for unemployed people in coastal communities to create and maintain a cleaner and safer coastal environment. For further information on the programme, see: http://www.environment.gov.za/ProjProg/CoastCare/index.htm.

[359] De Villiers "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa* (2009) 86-87.

The case studies provide evidence of the conservation authorities responsible for their management seeking to generate their own revenue through concession fees, conservation fees and tourism related-income. Some have recorded an increase in self-generated revenue, but this trend appears limited to national authorities managing CCAs of international repute and/or with existing tourism-related infrastructure.[360] Those tasked with managing provincial CCAs with limited tourism-related infrastructure have in contrast recorded a decrease in such income.[361] Efforts have furthermore been made in certain of the case studies to ensure that claimant communities with development rights contribute a share of the income generated through the exercise of such rights, towards the management of the CCA.[362] However, the income thresholds that trigger such contributions are yet to be realised and therefore such contributions have not been forthcoming to date.[363] This may be partly a result of the heavy reliance placed on the lodge concession model as the primary mechanism for generating income within the CCA.[364] The frailties inherent in this model have been canvassed above.[365] Cognisance should therefore be accorded to the full range of potential mechanisms for facilitating the financial sustainability of CCAs, rather than seeking to rely on one mechanism to do so.[366]

In this regard, it is important to note the broad range of economic incentives introduced by the Government in the past five years with the specific purpose of encouraging the role of the public in conservation. These economic incentives include: property tax

[360] Take for instance the Bhangazi case study, where tourism, retail and concession related income within the Isimangaliso Wetland Park increased by 27 % in 2010 (*Isimangaliso Wetland Park 2009/2010 Annual Report and Financial Statements* (2010)). Furthermore, take for instance the Richtersveld and Makuleke case studies, where SANParks, which is tasked with managing these areas, recorded a 10 % increase in such revenue (from R664 million in 2009 to R726 million in 2010) in 2010 (*SANParks Annual Report 2010* (2010)).

[361] Take for instance the Dwesa-Cwebe case study, where the Eastern Cape Parks Board responsible for its administration, recorded a 30 % decrease in self-generated income, from R6.9 million in 2008 to R5.3 million in 2009 (Eastern Cape Parks Board *Annual Report 2008/2009*, 96).

[362] In the context of the Makuleke and Dwesa-Cwebe Case studies, see respectively: Chapter 8 (Part 2.2) and (Part 2.3).

[363] For a discussion of this issue, see Chapter 9 (Part 9).

[364] Lodge concessions are either currently prevalent (Makuleke and Dwesa-Cwebe case studies) or eagerly anticipated (Richtersveld and Bhangazi case studies) as the primary source of self-generated income in the case studies. For further information, see the discussion of the case studies in Chapter 8.

[365] For a discussion of the potential challenges associated these concession agreements, see Chapter 9 (Part 9.2).

[366] For a discussion of these mechanisms, see Chapter 3 (Part 4.9).

rebates, reductions and exemptions for contracting land into certain forms of protected areas; income tax rebates for making donations to certain types of non-profit organisations; donations tax exemptions for making such donations; income tax deductions for a diverse range of conservation-related expenditure; and income tax deductions enabling landowners to set off the value of their land contracted into certain forms of protected areas.[367] While directly relevant to CCAs, their utility will remain somewhat limited until such time as certain anomalies inherent in their formulation are resolved and steps are taken to improve general awareness of their application.[368]

Providing financing to sustain the management of CCAs is but one element essential to their success. Support furthermore needs to be given to relevant CPIs to enable them to undertake their allocated roles in respect of the CCA.[369] The provision of post-settlement support to these institutions has been identified as one of the main problems undermining the success of South Africa's land reform programme.[370] Several factors exemplifying the need for such support are reflected in the case studies, such as: the lack of capacity and resources amongst CPIs to regulate their internal and external relations;[371] the ill-defined nature of the rights and benefits allocated to them;[372] and poor intergovernmental relations between the many relevant government authorities who have a role to play in managing the CCA and promoting rural development within and adjacent to it.[373] Two institutions are perhaps best placed to mitigate these challenges and provide the appropriate form of support to the CPIs. These are the

[367] A full discussion of these economic incentives unfortunately falls outside the purview of this dissertation. For further information, see generally: Paterson A "Considering Recent Developments in Environmental Fiscal Reform in South Africa" (2009) 16(1) *South African Journal of Environmental Law & Policy* 29-34; Paterson A "Property Tax - A Friend or Foe for Landscape Protection in South Africa (2005) 12 *South African Journal of Environmental Law & Policy* 97-121; and Paterson A "Tax Incentives - Valuable Tools for Biodiversity Conservation in South Africa' (2005) 122 *South African Law Journal* 182-216.

[368] A full discussion of these issues similarly unfortunately falls outside the purview of this dissertation. For further information, see the array of resources listed in note 367 above.

[369] For a discussion of this essential element, see Chapter 3 (Part 4.9). For a discussion of these potential roles, see Chapter 7 (Part 3.1).

[370] For a general discussion of this challenge, see Chapter 6 (Part 4.2). Take for instance the Dwesa-Cwebe case study, where the nature and responsibility for post-settlement support was not properly canvassed at the time the *Settlement Agreement* (2001) was concluded (Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 6, 39 & 43.

[371] For a discussion of this issue, see Chapter 9 (Part 7.2).

[372] For a discussion of this issue, see Chapter 9 (Parts 4, 8 and 9).

[373] For a discussion of this issue, see Chapter 9 (Part 7.1).

conservation agencies tasked with managing the CCA, and the municipalities within whose jurisdiction the CCAs are established.

Notwithstanding express provision for skills transfer and capacity building in most of the founding agreements, the management authorities in certain of case studies have failed to give effect to them.[374] This undermines both the functioning of the area, particularly the role of the co-management institution, and the potential for transferring management of the CCA to the community at some stage in the future. This would appear to be a very short-sighted approach given that the bulk of CCAs are subject to a fixed duration and will ultimately revert to the communities to manage, unless agreed otherwise. While the conservation authorities may point to the transfer of skills and capacity to community members through the employment opportunities provided within the CCA, these have largely been in unskilled and low-wage jobs.[375] Some commentators have even gone so far as arguing that claimant communities effectively constitute 'a new form of colonial and apartheid labour reserves'.[376] There is clearly a need to provide ongoing capacity development and support to enable communities to become more active participants in managing and developing CCAs.[377]

CCAs can play a vital role in rural development in South Africa.[378] Therefore, given their proximity to many of the CCAs and the nature of their core functions,[379] municipalities could and should play a significant role in supporting the CCAs, the CPIs and the development priorities of rural communities living within and adjacent to the CCAs. Municipalities' functions are guided by the integrated development plans (IDPs) they are

[374] In the context of the Makuleke case study, see: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 364; De Villiers *People and Parks - Sharing the Benefits* (2008) 80-81; and Reid (2002) *Human Ecology* 151. In the context of the Richtersveld case study, see: Grossman et al "Towards Transformation" in Suich et al *Evolution and Innovation* (2009) 360; and Fabricius et al (2007) *Water Policy* 88.

[375] In the context of the Makuleke case study, see: Robins et al (2008) *Development & Change* 67; Friedman "Winning Isn't Everything" (2005) 34-35; De Villiers et al *Land Reform: Trailblazers* (2006) 28; Reid (2002) *Human Ecology* 145; and Tapela B & Omara-Ojungu P "Towards Bridging the Gap Between Wildlife Conservation and Rural Development in Post-Apartheid South Africa: The Case of the Makuleke Community and the Kruger National Park" (1999) 81(3) *South African Geographical Journal* 148-155.

[376] Friedman "Winning Isn't Everything" (2005) 35.

[377] De Villiers et al *Land Reform: Trailblazers* (2006) 29.

[378] De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 2.

[379] For a discussion of local government functions of relevance to CCAs, see Chapter 4 (Part 4).

tasked with preparing, implementing and reviewing on an annual basis.[380] A fair degree of alignment is evident in some of the case studies between the relevant IDPs and the CCA management plans.[381] However, this is not always the case, especially where no management plan has been approved and therefore no alignment is feasible.[382] This latter conundrum has been partially overcome in certain of the case studies through the joint production of CCA specific development plans by the municipal authority, CPI and management authority.[383]

Notwithstanding such developments, significant challenges remain regarding the tangible provision of adequate municipal support to CCAs. These emanate from the scale of the demarcated municipal areas and the size of the populations falling within them. Take for instance the Makuleke case study, where these factors have conspired to ensure that there is little meaningful engagement between the Makuleke CPA and their geographically distant municipal authority.[384] The annual IDP review process[385] theoretically provides an excellent opportunity to reinvigorate such relations; refine and harmonise the relevant planning processes to ensure that they promote an appropriate form of development within and adjacent to the CCA; and ensure that they prescribe

[380] In terms of the Local Government: Transition Act (209 of 1993) and Local Government: Municipal Systems Act (32 of 2000), all local government authorities are compelled to prepare an integrated development plan (including a spatial development framework) that should guide their functions within their municipal area.

[381] Take for instance the Richtersveld case study where commentators have acknowledged the alignment between the Park's *Management and Development Plan* (South African National Parks *Richtersveld National Park Management and Development Plan* (undated) and the Richtersveld Municipality's *Integrated Development Plan* (Richtersveld Local Municipality *Integrated Development Plan* (2009)). See further in this regard: Turner et al *Community-Based Natural Resource Management* (2002) 39-40 & 42.

[382] Take for instance the Dwesa-Cwebe case study, where the absence of an approved management plan for the area has precluded its alignment with the relevant municipal IDPs (Amathole District Municipality *Integrated Development Plan* (2009-2010) and the Mbashe Local Municipality *Integrated Development Plan* (2009)). See further in this regard: Fay (2009) *World Development* 1424; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 53-55.

[383] Take for instance the Dwesa-Cwebe case study, where the Amathole District Municipality published a specific *Development Plan* for the Dwesa-Cwebe Nature Reserve (Amathole District Municipality *Dwesa-Cwebe Development Plan* (2003)). The plan seeks to promote institutional and functional alignment; and clarify the nature of the municipal authority's supporting role to the Dwesa-Cwebe Nature Reserve. See further in this regard: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 52; and *Draft Integrated Reserve Management Plan* (2006) 6-7.

[384] Turner et al *Community-Based Natural Resource Management* (2002) 36-38.

[385] Section 34 of the Local Government: Municipal Systems Act (32 of 2000) provides for the mandatory annual review of integrated development plan by municipal authorities.

detailed timelines and clearly allocated responsibilities.[386] Some commentators are however of the view that this is unlikely to occur given the relatively small size of many of the CCAs and the populations directly affected by them.[387] As a result, the CPIs may effectively be compelled to take on municipal functions in and adjacent to the CCAs, fund these through the meagre proceeds derived from the CCA, and manage their relations with third parties without support from municipal structures.[388]

Providing support to CPIs and CCAs is clearly an essential but difficult enterprise given the broad range of institutions and authorities within whose mandate the task potentially falls, and the lack of coordination frequently characterising the relations between them.[389] It has therefore been suggested that overarching structures be created, representative of all relevant institutions and authorities, to coordinate the provision of such support and to improve communication between them.[390] Calls have furthermore been made to ensure that such structures are appropriately resourced and capacitated.[391] These suggestions would appear well founded but will need to be reviewed and amended on a regular basis given the shifting needs and nature of the local government authorities and CPIs that are party to them.[392]

11. CONCLUSION

Using the four case studies canvassed in Chapter 8, I have sought to assess critically the extent to which South Africa's legal framework reflects general adherence to the essential elements identified by international scholars as theoretically underpinning successful CCAs. What should be very evident from the analysis of the four case

[386] De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 64. See further: Hall *The Impact of Land Restitution and Land Reform on Livelihoods* (2007) 17-18.
[387] Turner et al *Community-Based Natural Resource Management* (2002) 37. See further: Isaacs et al *Co-Managing the Commons in the 'New' South Africa* (2000) 18.
[388] Turner et al *Community-Based Natural Resource Management* (2002) 17.
[389] De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 60.
[390] In the context of the Dwesa-Cwebe case study, see: De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 60-61; and Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 43.
[391] In the context of the Dwesa-Cwebe case study, see: Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 45-50; and De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 64.
[392] De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 64.

studies is that South Africa's scorecard is far from ideal. Domestic administrators continue to rely on a very narrow array of governance options for promoting CCAs. The planning process which precedes their establishment, while frequently protracted, often fails to lay an adequate, objective and informed platform for subsequent negotiations over the precise nature and form of land tenure, management and access, use and benefit-sharing. The consultation and negotiation process itself is in turn often undermined by problems associated with identifying relevant stakeholders and ensuring parity in their capacity and resources to participate within the process. As a result, questions are raised about the equity of the process and its outcome, as reflected in the founding agreements, with the interests of conservation frequently seemingly to outweigh those of land reform and rural development.

If one considers the manner in which the founding agreements cater for the three main components underlying protected areas governance, additional concerns become evident. Regarding land tenure, the adoption of an all or nothing approach appears to have precluded a consideration of available nuanced forms of limited tenure rights that may provide more workable and realistic options for matching the de iure legal option to the de facto reality. The issue of land tenure is furthermore clouded by the failure to clearly define the land tenure rights in the founding agreements, an array of practical obstacles in the land restitution process and the continued absence of South Africa's communal land tenure regime. Regarding management, the heavy reliance placed on the contested co-management option, and a very narrow formulation of it, has barred several other viable options for facilitating active community participation in the management of CCAs. Furthermore, the manner in which it has been implemented has frequently precluded equitable and participatory decision-making within the co-management institutions, leading to a clear disjuncture between form and practice. Finally, regarding access, use and benefit-sharing schemes, their nature is similarly narrow in formulation and they often fail to consider the full array of realistic and viable options that can deliver significant tangible and intangible benefits to communities. Problems have furthermore been noted both in relation of the implementation of these

schemes and the extent to which the distribution of the limited benefits which accrue through them are distributed in an equitable and accountable manner.

The problems characterising the above three broad components are compounded by significant challenges facing the CPIs and government authorities tasked with their implementation. Specific concerns noted in the context of the CPIs relate to their rigid composition, capacity constraints, lack of open and accountable decision-making processes and their uncertain relationship with institutions of traditional authority. In the context of government authorities, the main concerns relate to the fragility or absence of cooperative governance and the shifting nature of the functions of certain authorities with a key role to play in supporting CCAs, most notably municipal authorities. The case studies do provide evidence of several measures specifically aimed at providing support to CPIs, improving their relationship with relevant government authorities and promoting cooperative governance between government authorities with relevant overlapping mandates. The implementation of such measures is unfortunately rather sporadic. Extending their application will no doubt improve the current functioning of CCAs. However, unless they are accompanied by moves to diversify the models for financing the CCAs themselves, particularly those with limited eco-tourism potential and/or infrastructure, these institutions and authorities will have no purpose to serve.

The case studies clearly illustrate significant challenges and anomalies within South Africa's domestic legal framework of relevance to CCAs. As highlighted at the outset of this chapter, its content does not purport to provide an exhaustive analysis of the extent to which each case study reflects the presence or absence of each of the essential elements highlighted in Chapter 3. I have rather sought to draw pertinent examples from the four case studies which illustrate the challenges faced by policy-makers in giving domestic effect to these elements; highlight inherent strengths and weaknesses of the existing legal framework; and hold lessons for future legislative reform to provide for the more effective domestic implementation of these elements. It is to this analysis of future legislative reform which I turn in the concluding chapter of this dissertation.

PART IV

THE SOLUTION

Part IV of the dissertation seeks to plot the way forward for the extended use of communally-conserved areas as a tool for bridging South Africa's conservation and land reform imperatives. Chapter 11 (titled *Tweaking the Legal Landscape to Improve its Effectiveness and Sustainability*) seeks to distil a series of concrete recommendations on how to reform the current domestic legal framework to create a more effective and sustainable regime for communally-conserved areas. It draws together the following key aspects discussed in the previous chapters of the dissertation. First, the elements identified by international and domestic scholars during the past two decades as essential to the proper regulation of the natural commons and communally-conserved areas (Chapters 2 and 3). Secondly, the strengths and weakness of South Africa's existing regime of relevance to communally-conserved areas (Chapters 4, 5, 6 and 7) and how these have manifest in several domestic case studies (Chapters 8 and 9).

CHAPTER 10

TWEAKING THE DOMESTIC LEGAL LANDSCAPE TO IMPROVE ITS EFFECTIVENESS AND SUSTAINABILITY

1. INTRODUCTION

The primary question sought to be addressed in this dissertation is whether communally-conserved areas (CCAs) provide a useful tool for bridging the gap between South Africa's conservation and land reform agendas; and if so, how to provide for their effective and equitable implementation. I proposed at the outset that in order to answer this question I would need to consider several subsidiary questions.[1] First, how do concepts such as the natural commons, protected areas and governance relate to one another? Secondly, what are CCAs and why have they recently come to the fore as a prominent form of protected areas governance? Thirdly, what elements underpin successful CCAs? Fourthly, how does South Africa's current legal framework provide for CCAs to balance the country's conservation and land reform agendas? Fifthly, how has this legal framework been implemented to date to provide for CCAs? Sixthly, has the implementation of this legal framework been successful and to what extent does it reflect the elements identified by international protected areas scholars as integral to well-functioning CCAs? Finally, how can South Africa's regime as regards CCAs be improved to strike an optimal balance between the country's conservation and land reform agendas? Prior to considering this last question, it would be prudent to briefly reflect on the manner in which I addressed those that precede it.

[1] See Chapter 1 (Part 2).

2. A BRIEF REFLECTION

2.1 THE CONTEXT

I began the enquiry in Chapter 2 (titled *The Role of Protected Areas as a Tool for Managing the Natural Commons*) by traversing two broad contextual and largely theoretical issues relating to protected areas founded on communal property regimes, namely: the *objective* of the CCAs – managing the natural commons; and the general *form* of CCAs – protected areas. Regarding their object, I sought to highlight how the meaning of the natural commons remains troubled, but is integrally connected to issues of property rights and land tenure. I emphasised how the failure by traditional 'commons' scholars to draw clear distinctions between the nature of the resource system and the nature of the property rights applicable to it, has been manipulated in the past by policy-makers to entrench exclusionary, protectionist and state-centred approaches to conservation in areas previously subject to effective communal property regimes. I highlighted that although the concept of 'the commons' remains somewhat ambiguous and its regulation subject to continued debate, shifting conservation paradigms in the past two decades have significantly altered the path of these debates. These debates now largely focus on identifying necessary prerequisites for implementing effective communal property regimes aimed at conserving common-pool natural resources. I emphasized that it was this aspect of the broader commons puzzle and its relationship to protected areas, specifically terrestrial and statutory prescribed protected areas subject to communal property regimes, which form the focus of this dissertation.

Regarding their form, I traversed the array of recent efforts to improve the understanding, planning for and recording of the diversity of forms of protected areas that exist across the globe. While acknowledging recent initiatives to generate a global governance typology for protected areas, most notably the inclusion of governance types in the *IUCN Management Guidelines (2008),* I highlighted several inherent frailties with this typology and proposed a revised approach to understanding the key issue of

protected areas governance, one that seeks to identify the elements underpinning protected areas governance, rather than uncomfortably delimiting governance types within pre-labelled boxes.

Through the above analysis, I sought to circumscribe the meaning of several very anomalous terms of relevance to this enquiry (such as the commons; common pool resources; communal property; protected areas; governance; and protected areas governance); clearly delimit the ambit of the general enquiry to terrestrial and statutory prescribed protected areas subject to communal property regimes; and provide the necessary context for the subsequent theoretical analysis of what I termed CCAs.

In Chapter 3 (titled *The Nature, Form and Factors Influencing Communally-Conserved Areas*) I introduced and defined the concept of CCAs. I proposed that this concept provides a more workable lens than the IUCN protected area governance paradigm, through which to describe, plan for and evaluate the exceedingly diverse efforts to conserve common-pool natural resources through communal property regimes. I surveyed the trends inherent in recent economic, property rights, ecology, human rights and protected areas dialogues which have contributed to the tectonic shift in conservation ideology – a shift from conventional protectionist, exclusionary and state-centred approaches to contemporary inclusive, participatory and human-centred approaches. I illustrated how this shift has led to the rise in prominence of CCAs and how current debates focus less on the merits of the conventional verse contemporary approaches, and more on the elements that promote the latter's successful implementation. I thereafter drew from relevant international literature to distil a series of elements that I argued should underpin any regime seeking to provide for CCAs. I arranged these elements under several themes, namely: types of CCAs; planning; land tenure; consultation and negotiation; declaration; institutions; management; access, use and benefit-sharing; and financing and support.

2.2 THE LAW

Having defined the concept of CCAs and distilled the elements that theoretically underlie their successful implementation, I then turned in Part II of the dissertation to an evaluation of the extent to which South Africa's legal framework provides for their use as a tool for bridging the country's conservation and land reform agendas. I highlighted the challenges inherent in undertaking such an analysis given that the requisite domestic legal framework sits somewhat uncomfortably between two legal domains, namely conservation and land reform, which have both undergone significant transformation in the past decade or so following South Africa's transition to a constitutional democracy in the mid-1990s.

I commenced this analysis from a broad perspective by examining the country's constitutional dispensation of relevance to CCAs in Chapter 4 (titled *South Africa's Constitutional Regime of Relevance to Communally-Conserved Areas*). I analysed the array of relevant rights enshrined in the Constitution of the Republic of South Africa, 1996, most notably the environmental right and the property clause, and how these have shaped South Africa's contemporary conservation and land regime of relevance to CCAs. I emphasised that while providing their constitutional foundation, very little clarity is unfortunately provided as to the intersection of these rights and how to resolve tensions that arise between them. I further emphasised how this apparent disjuncture in the Constitution has permeated the contemporary conservation and land regime of relevance to CCAs. I then considered the constitutional recognition afforded to customary laws and institutions of traditional authority. I highlighted that while customary law and traditional authorities continue to play a significant role in the context of rural land administration, their role in the context of conservation and CCAs in particular is yet to be clearly articulated. I finally addressed the issue of governance and specifically the legislative and executive competences afforded to the three spheres of government to make and administer laws of relevant to CCAs. I argued that the overlapping and fragmented nature of these competences is partly to blame for the

dysfunctional divide that has characterised the domestic relationship between the conservation and land reform regimes for the bulk of the past two decades.

I then traversed South Africa's extensive conservation regime of relevance to CCAs in Chapter 5 (titled *South Africa's Environmental Regime of Relevance to Communally-Conserved Areas*). I discussed the significant reforms of the past five years that seek to promote a far more inclusive, participatory and human-centred approach to conservation, to that which existed prior to 2005. I highlighted the number of mechanisms inherent in these reforms for implementing CCAs, several recent policies and programmes which have sought to facilitate the implementation of these mechanisms, and the exceedingly diverse array of institutions tasked with doing so. I concluded that South Africa's contemporary conservation regime holds great potential for implementing CCAs but that notwithstanding its promulgation over five years ago, the use of these mechanisms has been disconcertingly sporadic. I furthermore stressed the anomaly that the majority of these mechanisms were absent during the first decade of South Africa's land reform programme and that in their absence, the country's land reform authorities were compelled to fashion their own mechanisms when restoring communal land situated within protected areas.

This land reform regime formed the focus of Chapter 6 (titled *South Africa's Land Regime of Relevance to Communally-Conserved Areas*). I critically considered the elements of South Africa's land reform programme of relevance to CCAs, specifically those relating to land restitution and land tenure reform. In the context of land restitution, I called into question the trend of land authorities in implementing this regime to adopt one governance option when resolving land restitution claims in protected areas, rather than tailoring different land tenure and management options to suit the specificity of each. I furthermore highlighted the practical problems inherent in the existing land restitution regime that hold potential for complicating the resolution of the extensive outstanding restitution claims over land situated in protected areas. In the context of the land tenure component of the land reform programme, I addressed the problems inherent in the legal regime governing communal property institutions (CPIs)

that currently undermine, and will continue to undermine, their role as effective and equitable institutions for holding restored land situated within protected areas. I furthermore analysed the anticipated legal regime governing communal land rights and the extent to which its procedures, tenure options and institutions hold potential for both overcoming and further complicating the historic problems associated with communal land administration in rural areas.

Having highlighted the manner in which these two regimes have operated in isolation from one another for the bulk of the past two decades, I then turned to analyse several recent government initiatives which have sought to traverse this artificial and dysfunctional divide in Chapter 7 (titled *Linking South Africa's Conservation and Land Reform Regimes*). While acknowledging the valuable guidance that these initiatives have provided to administrators tasked with settling the outstanding communal land restitution claims in protected areas, I sought to illustrate through my critical appraisal of these initiatives, their inherent theoretical and practical frailties. Perhaps the most significant of these frailties is the entrenchment of co-management, and an exceptionally narrow formulation of it, as the favoured governance option for perpetuating CCAs in South Africa. I argued that this narrow vision shrouds several other governance options provided for within South Africa's domestic legal framework for implementing CCAs. I suggested further that this might in turn undermine the role of CCAs as tools for bridging South Africa's conservation and land reform regimes.

I thereafter considered these apparently misunderstood governance options that theoretically provide domestic stakeholders with a far more diverse and nuanced array of tools for linking the country's conservation and land reform agendas. In order to unpack these governance options, I briefly returned to the issue of protected areas governance and distilled an array of governance options which theoretically underpin the implementation of CCAs, namely: owner/manager; owner/co-manager; owner/beneficiary; non-owner/manager; non-owner/co-manager; and non-owner/non-manager/beneficiary. I illustrated how South Africa's current relevant legal framework caters for the implementation of each of these governance options. Having done so, I

concluded that while South Africa appears on paper to have a comprehensive legal framework providing for the implementation CCAs, the regime is beset by several inherent challenges.

2.3 THE PRACTICE

To better illustrate these challenges, and the various opportunities that exist for overcoming them, I sought to reflect critically on the manner in which domestic administrators have sought to implement the various components of this regime to balance the country's conservation and land reform agendas. This enquiry formed the focus of Part III of the dissertation, in which I considered the functioning of four case studies – four domestic CCAs established during the course of the past two decades. These case studies, introduced in Chapter 8 (titled *South Africa's Experimentation with Communally Conserved Areas*), are the Richtersveld National Park, the Pafuri Region of the Kruger National Park, the Dwesa-Cwebe Nature Reserve and the Eastern Shores Region of the Isimangaliso Wetland Park. While acknowledging the desirability of considering all CCAs established in the past two decades in order to evaluate the merits of the domestic regime, I highlighted that this was simply unfeasible and justified my selection of the four case studies from a geographical, governance, temporal and practical perspective. Drawing on their founding agreements and the comprehensive research undertaken by several anthropologists, sociologists, ecologists and economists working in each of the four CCAs in the past two decades, I described the history of each and objectively detailed the governance options that underpin them.

This analysis effectively provided the context for Chapter 9 (titled *Evaluating South Africa's Experiment with Communally-Conserved Areas*). In this chapter, I critically considered the extent to which the case studies reflect general adherence to the essential elements identified by international scholars as theoretically underpinning successful CCAs (which I distilled in Chapter 3). The outcome of this analysis indicated that South Africa's scorecard is far from ideal. Domestic administrators continue to rely on a very narrow array of governance options for promoting CCAs. The planning

process which precedes their establishment often fails to lay an adequate, objective and informed platform for subsequent negotiations over the precise nature and form of land tenure, management and access, use and benefit-sharing arrangements. The consultation and negotiation process is itself often undermined by problems associated with identifying relevant stakeholders and ensuring parity in their capacity and resources to participate. As a result, the equity of the process and its outcome, as reflected in the founding agreements, is brought into question with the interests of conservation frequently seemingly to outweigh those of land reform and rural development.

In the context of land tenure, the adoption of an all (full title) or nothing (no-title) approach has precluded the consideration of available nuanced forms of limited tenure rights that may provide more workable and realistic options for matching the de iure legal option to the de facto reality. The issue of land tenure is furthermore clouded by the failure to clearly define the land tenure rights in the founding agreements, an array of practical obstacles in the land restitution process and the continued absence of South Africa's communal land tenure regime. With regard to management, heavy reliance is placed on the contested co-management option, and a very narrow formulation of it. This has prevented several other viable options for facilitating active community participation in the management of CCAs. Furthermore, the manner in which it has been implemented often precludes equitable and participatory decision-making within the co-management institutions. This has often led to a clear disjuncture between form and practice. Finally, regarding access, use and benefit-sharing schemes, their nature is similarly narrow in formulation. These schemes also often fail to consider the full array of realistic and viable options that can deliver significant tangible and intangible benefits to communities. Problems have furthermore been noted both in relation of the implementation of these schemes and the extent to which the limited benefits which accrue through them are distributed in an equitable and accountable manner.

Significant hurdles facing CPIs and government authorities tasked with their implementation further compound the above challenges. Specific concerns noted in the context of the CPIs relate to their rigid composition, capacity constraints, lack of open

and accountable decision-making processes and their uncertain relationship with institutions of traditional authority. In the context of government authorities the main concerns relate to the fragility or absence of cooperative governance and the shifting nature of the functions of certain authorities with a key role to play in supporting CCAs, most notably municipal authorities. The case studies do provide evidence of several measures specifically aimed at providing support to CPIs, improving their relationship with relevant government authorities and promoting cooperative governance between government authorities with relevant overlapping mandates. The implementation of such measures is unfortunately rather sporadic. Extending their application will no doubt improve the current functioning of CCAs. However, unless they are accompanied by moves to diversify the models for financing the CCAs themselves, particularly those with limited eco-tourism potential and/or infrastructure, these institutions and authorities will have no purpose to serve.

3. OPTIONS FOR REFORM

The case studies clearly illustrate significant challenges facing the implementation of South Africa's vast domestic legal framework of relevant to CCAs. All that now remains to be considered are several recommendations (the solutions) for tweaking this legal regime so as to ensure that it promotes a more effective and equitable balance between South Africa's conservation and land reform agendas. These recommendations are similarly structured according to the themes identified as underlying successful CCAs in Chapter 3 and used to analyse the case studies in Chapter 9. At the outset, it must be emphasised that these recommendations highlight the general areas requiring reform and possible broad options for such reform. They do not purport to provide an extensive analysis of the precise nature and detail of such reform. The latter falls outside the purview of this dissertation and will comprise the focus of subsequent research.

3.1 TYPES OF COMMUNALLY-CONSERVED AREAS

While South Africa's relevant legal framework does not provide expressly for CCAs, it does contain several options enabling local communities to become involved in protected areas whether as owners, managers, beneficiaries or developers.[2] While this flexibility is desirable, it can unfortunately lead to confusion and discontent.[3] This is particularly so where capacity-building programmes aimed at promoting understanding of the options and the factors that should inform their selection do not accompany its introduction. Such confusion and discontent is reflected in the case studies, most clearly in the Government's narrow reliance on the co-management 'lease model' to settle the majority of land reform claims in protected areas.[4] Each land claim in a protected area is unique and role-players therefore have to fashion unique solutions. Adopting a 'one-size-fits-all approach' is not the solution.[5]

The existing legal framework providing for these options accordingly does not appear to require reform. What is urgently required however, is the implementation of capacity-building programmes aimed at promote understanding of these options amongst all relevant stakeholders. This would assist in ensuring that the most appropriate legal option is selected – one ideally matched to the specificity of the community and the area. The existing National and Provincial People and Parks Forums and Steering Committees[6] would appear the natural structures through which to implement such programmes. These programmes will clearly need to be accompanied by a review of the *Memorandum of Understanding*[7] and *National Co-Management Framework*[8] so as to ensure that both accurately reflect the full array of options inherent in the relevant

[2] See Chapter 7 (Part 3.1).
[3] See Chapter 9 (Part 2).
[4] Ibid.
[5] De Villiers B *People and Parks - Sharing the Benefits* (2008) KAS Johannesburg 83; De Villiers B "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa: Constructive Aims and Positive Outcomes - Reflecting on Experiences on the Way to 2014* (2009) Seminar Report No.20, KAS Johannesburg 84; and Walker C *Land-Marked* (2008) Jacana Media (Pty) Ltd Auckland Park 140.
[6] See Chapter 5 (Part 3.3.3).
[7] Minister of Agriculture and Land Affairs and Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007) dated 2 May 2007.
[8] Department of Environmental Affairs *National Co-Management Framework* (2010).

legal framework and the array of factors that should inform their selection.[9] These factors would include: the nature of the local community (the size of the community; their proximity to the protected area; the coherence of the community; the connectivity of the community to the protected area; the development potential of the community; the resources and capacity of the community; and the availability of support for the community);[10] and the nature of the land and resources situated in, or to be incorporated in, the CCA (the conservation and cultural importance of the area; the viability of alternative land-use and resource-use in the area; the development and beneficiation potential of the area; and the availability and feasibility of alternative land claim settlement options). Attention should also be drawn to the fact that these options are not cast in stone, and that local communities can accordingly shift between them over time, as their skills, resources and needs change.[11]

3.2 PLANNING

What should be clear from the analysis of South Africa's contemporary conservation and land reform regimes is that both make provision for comprehensive planning processes.[12] However, as indicated by the case studies, their implementation has been far from ideal.[13] While legislative reform may not again prove necessary, steps clearly need to be taken to improve the alignment between the two planning processes and the efficiency and inclusivity of both. First, in the context of conservation planning, often well-developed but somewhat outdated park-level plans should be reconsidered and aligned with contemporary national, regional and local conservation planning frameworks. This would ensure that land situated within any existing protected area, which is subject to a land claim, actually constitutes land of high conservation value. This may aid in legitimising the conservation authorities desire to conserve the land,

[9] See Chapter 7 (Part 3.2).
[10] De Koning M "Co-Management and its Options in Protected Areas of South Africa' (2009) 39(2) *Africanus* 8.
[11] See Chapter 7 (Part 3.2).
[12] The conservation regime makes provision for an array of planning mechanisms at national, regional and local level (see further Chapter 5 (Part 3)). The land reform regime includes provision for pre-feasibility studies to inform the selection of the most appropriate land claim settlement options (see further Chapter 6 (Part 2)).
[13] See Chapter 9 (Part 3).

remove the tendency of some conservation authorities to hold onto land of low conservation value, and potentially free up land for alternative land uses by claimant communities. Secondly, the inclusion of environmental factors into relevant land reform policies and plans should be promoted.[14] Thirdly, steps should be taken to ensure that the implementation of the statutory conservation and land reform planning processes which precede the formation of a CCA, are far better aligned with one another; more inclusive, transparent and participatory; and realistic regarding the array of possible and viable CCA options presented to claimant communities. Fourthly, given the often integral link between CCAs and rural development, the planning processes informing their creation and implementation should be better aligned to local development planning processes (such as integrated development plans and spatial development frameworks) and the rural development programmes (most notably the *Comprehensive Rural Development Programme*[15] and the *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa*[16]). This may aid in ensuring the long-term sustainability of the CCA and promote the inclusion of local and district municipalities as key role players in the planning process. Finally, to promote tangible inclusivity and participation, the requisite resources and capacity should to be afforded to all stakeholders to enable them to properly engage in the planning process.

3.3 LAND TENURE

As I have illustrated through the case studies, the adoption of an 'all or nothing' approach to land tenure in the restitution context has proven very problematic.[17] I would accordingly urge the Government to consider carefully the merits of granting alternative and limited forms of tenure (in the form of access and use rights) as opposed to full tenure to land claimant communities in appropriate circumstances. As I have previously

[14] This is specifically recognised in Sustainable Development Consortium *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa: A Synthesis Report* (2007) Commission on Restitution of Land Rights Pretoria 222-223.
[15] Ministry of Rural Development and Land Reform *The Comprehensive Rural Development Programme Framework* (2009). See Chapter 6 (Part 4.1).
[16] Sustainable Development Consortium *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa: A Synthesis Report* (2007) Commission on Restitution of Land Rights Pretoria. See Chapter 6 (Part 4.2).
[17] See Chapter 9 (Part 4.1).

indicated, the Restitution of Land Rights Act makes specific provision for the restoration of not only full tenure, but also "rights in land".[18] Granting the latter may better enable authorities to tailor unique solutions to suit the specificities of the particular community and protected area. It may also ensure that the de iure settlement arrangement better reflects the de facto reality, thereby minimising the misconception over the nature of land rights held by claimant communities, and the potential for future discontent and conflict between them and conservation authorities. These misconceptions, discontent and conflict are clearly illustrated in all four of the case studies canvassed in this dissertation.[19] I would furthermore advocate a rethink of the current aversion reflected in both the *Memorandum of Understanding* and *National Co-Management Framework* to occupation as a viable restoration option within protected areas, where appropriate.[20] The contemporary international conservation discourse of relevance to CCAs clearly dispels the myth that conservation and occupation are mutually exclusive concepts.[21] While such occupation would need to be very carefully structured and managed, its preclusion as a possible restitution option would not appear justified.

Integrally linked to the above, is the manner in which the relevant land tenure rights and responsibilities are recorded in the agreements underpinning the formation of the CCAs. As is once again illustrated by the case studies, current practice is far from ideal.[22] Urgent measures are required to ensure that the land tenure rights and responsibilities of all parties are very clearly framed in these agreements to promote clarity and certainty.[23] They should furthermore ideally be recorded in one agreement and not have to be distilled from several different documents.

[18] See Chapter 6 (Part 2.1).
[19] See Chapter 9 (Part 4).
[20] See Chapter 7 (Part 2)
[21] See Chapter 3 (Part 4.4).
[22] See Chapter 9 (Part 4.2).
[23] This is specifically recognised in the *Settlement and Implementation Support Strategy* (2007) 222-223.

The process for concluding these contractual relations has clearly been improved in recent times, especially since the introduction of the *Memorandum of Understanding* (together with its *Operational Protocol*) and the *National Co-Management Framework*.[24] Not only do they prescribe a principle framework for guiding the content of these agreements, but also clearly set out the process to be followed and the requisite responsibilities of the conservation and land reform authorities in it. This clarity is naturally to be welcomed. There are however several aspects which often hamper the process and accordingly require urgent attention.[25] First, the significant capacity and resource constraints undermining particularly the Department of Rural Development and Land Reform and the Restitution of Land Rights Commission need to be resolved. Secondly, where the land in question is state-owned, the procedures relating to the disposal of such land need to be expedited. Thirdly, where full title is to be transferred, the procedures for the transfer of title deeds need to be hastened. The current slow rate of transfer is recognised as frustrating the ability of local communities to secure essential financing and enter partnerships with commercial entities.

However, none of these proposed reforms will prove successful until such time as the Government finalises the country's future communal land tenure regime. The general problems associated with its continued absence have been comprehensively canvassed in this dissertation.[26] In the context of CCAs, the prescription of South Africa's communal land tenure regime is paramount from three main perspectives. First, it is communal land tenure that underlies CCAs. The absence of a coherent regime governing communal land tenure therefore seriously undermines the current and future use of CCAs as an effective tool for simultaneously realising vital conservation objectives, real transformation in rural land ownership patterns and tangible rural development. Secondly, the administration of communal land tenure in rural areas is integrally intertwined with the status of traditional leadership structures. It is the newer often more democratic CPIs, such a communal property associations and trusts, which generally hold tenure over the land and resources situated in CCAs. They are the

[24] See Chapter 7 (Part 2).
[25] For a discussion of these problems, see Chapter 9 (Part 4.3).
[26] See Chapter 6 (Part 3.2) and Chapter 9 (Part 4.4).

institutions that accordingly represent community interests in the agreements underpinning the formation of CCAs. However, the boundaries of CCAs often overlap with land falling under the administration of traditional leadership structures. Until such time as domestic policy-makers clearly circumscribe the role and functions of these often-autocratic traditional leadership structures in South Africa's future communal land tenure regime, destructive battles will continue to wage between them and their contemporary counterparts. Finally, while these contemporary CPIs have been used to fill the apparent vacuum, history has shown that their composition, decision-making processes and the nature of the tenure rights held by them is far from ideal. These challenges will similarly continue to abound until such time as South Africa's communal land tenure regime, together with its revised communal land tenure institutions, is prescribed.

It is acknowledged that this is no easy task given its political ramifications – most notably the erosion of traditional leadership authority over rural land administration. Fourteen years have passed however, since the publication of the *White Paper on South African Land Policy*,[27] within which the Government undertook to address the issue of communal land tenure. The time is clearly 'over-ripe' for the Government to do so – to tackle one of the hardest and politically sensitive issues it has had to address – one which is however essential for promoting equity, transparency and certainty amongst the 14 million people who practice communal land tenure in South Africa.[28] The precise nature and form of South Africa's future communal land tenure regime cannot be determined by this thesis. I can recommend, however, that policy-makers draw from the comprehensive academic debate that has surrounded the formulation of the draft versions of the Communal Land Rights Act and the constitutional challenges to its final iteration.[29] The underlying approach advocated by the bulk of this commentary is one which recognizes the flexible, inclusive, layered and nested nature of communal land tenure rights; and one which affords statutory recognition to both group rights and

[27] Department of Land Affairs *White Paper on South African Land Policy* (1997).
[28] Pienaar G "The Land Titling Debate in South Africa" (2006) 3 *Tydskrif vir die Suid Afrikaanse Reg* 435.
[29] See Chapter 6 (Part 3.2), Chapter 9 (Part 4.4) and the resources cited there.

the myriad forms of fragmented-use rights which are prevalent in rural areas of South Africa.

3.4 CONSULTATION AND NEGOTIATION

While the analysis of the case studies reflect several problems in the consultation and negotiation process that preceded their formation,[30] the majority of these appear to have been resolved through the promulgation of South Africa's contemporary conservation regime. This regime contains several procedural safeguards that should promote fairness, openness and transparency within the statutory processes governing the formation of CCAs.[31] These safeguards are complemented by recent initiatives aimed at linking its implementation with that of the land reform regime, most notably the *Memorandum of Understanding* and the *National Co-Management Framework*. Read together, they furthermore contain several mechanisms for resolving conflicts that may arise in the negotiating process, through both formal and alternative forms of dispute resolution.[32]

However, notwithstanding these legislative and policy developments, there remains room for improvement with regard to the negotiation process and the agreements to emerge from it. In respect of the former, problems relating to the identification of claimant communities remain, as does the unfortunate trend of compressing often-diverse communities into fictitiously unified CPIs for the purpose of negotiating land restitution settlements.[33] The promulgation of a communal land rights regime of the nature proposed above should go some way toward assisting in identifying relevant community stakeholders, affording recognition to the diversity inherent within and between them, and creating appropriate institutions to represent them in their dealings with one another and with relevant government authorities. This re-emphasises the need for South Africa's communal land rights regime to be finalised forthwith.

[30] See Chapter 9 (Part 5).
[31] See Chapter 5 (Part 3).
[32] See Chapter 5 (Part 3) and Chapter 6 (Part 2).
[33] See Chapter 9 (Part 5.1).

Problems do not however only arise in relation to identifying relevant local community stakeholders. The case studies further reflect the tardy participation or omission of key government authorities from the negotiation process. While both the land restitution regime[34] and contemporary conservation regime[35] mandate consultation with relevant government authorities, there appears on occasion to be uncertainty as to who these relevant authorities are. It may therefore be prudent to impose a statutory obligation on those stakeholders initiating the process to establish a CCA: to first, scope all potentially relevant stakeholders, including relevant government authorities, as part of the planning process; and secondly, to include them in all subsequent negotiations. This may ensure that all relevant stakeholders are drawn into the negotiating process as early as possible.

Additional measures are also required to ensure that the CPIs in particular have the requisite capacity and resources to participate equitably in the negotiation process.[36] Owing to its inherent value in forging not only viable solutions but also fostering long-term relationships based on trust and mutual respect, I advocate that clarity as to the precise form and nature of such measures be prescribed as a matter of law, rather than left to the whim of administrators and external benefactors. Furthermore, I propose the prescription of a set of negotiating principles to guide the conduct of all stakeholders that are party to such negotiations; and the statutory identification of an array of factors that must be taken into account by these stakeholders in selecting the most appropriate legal option. These measures could be complemented by the appointment of independent observers or ombudsmen to monitor and vouch for the equity, inclusivity and transparency of the negotiating process.

Several of the case studies provide excellent examples of the fact that the creation of CCAs frequently involves 'a clash of local, regional, national and even international

[34] See Chapter 6 (Part 2.1).
[35] See Chapter 5 (Part 3.1).
[36] This is specifically recognised in the *Settlement and Implementation Support Strategy* (2007) 222-223.

interests'.[37] The latter clash of interests is very evident where CCAs are established and then subsequently incorporated into transboundary conservation initiatives. Government authorities need to ensure that local community representatives are invited to be a party to the negotiation of these transboundary initiates, especially where the community holds tenure over the land, or a part thereof, to be included in the transfrontier park. Their notable omission, as vividly illustrated in the Richtersveld and Makuleke case studies, may well stem from the absence of a statutory or policy framework guiding the process to be followed in establishing transfrontier parks. While not advocating an entire new domestic regime to specifically govern such parks, I do propose the prescription of clear procedures to ensure that the negotiation of the international agreements underpinning them take place in an open, accountable and inclusive manner. I further propose that these procedures ensure that relevant communities holding tenure within the anticipated transfrontier park are a party to these negotiations, and that provision is made for them to be duly represented on the transfrontier park's management and/or advisory institutions.

As has been identified in the context of land tenure above, the terms of the founding agreements emanating from these negotiations need to be very clearly defined and recorded. The different formulations illustrated by the case studies are rich in their diversity, yet exceedingly confusing in their application and comparison.[38] Such confusion could potentially be mitigated through the preparation of a series of pro-forma agreements highlighting the generic aspects which ought to be contemplated during negotiations, and which should ultimately be addressed in some form in the resultant agreement. These aspects could include: the identification of the types of stakeholders who should be a party to it; the shared vision and objectives for the CCA; the description of the boundaries of the CCA; the governance option underpinning the CCA; the parties' respective rights and obligations in respect of CCA (with clear timelines for executing and fulfilling them); the institutions created to administer the CCA (including their composition, powers and functions); any access, use and benefit-sharing

[37] Walker *Land-Marked* (2008) 110.
[38] See Chapter 9 (Part 5.2).

arrangements (including their precise nature and form, who has access to them, the distribution of benefits, and who is responsible for such distribution); conflict resolution procedures; the duration of the arrangement; and finally provision for regular monitoring, reporting and review (including its nature, its frequency, who is responsible for it, and any prerequisites and procedures for affecting amendments to, or terminating, the agreement). Without becoming too prescriptive and aware of the dangers inherent in the use of pro-forma agreements, they could be tailored to suit the different options inherent in South Africa's legal framework of relevant to implementing CCAs. They could furthermore be made readily accessible for public reference, use and adaptation.

3.5 DECLARATION

Since the advent of the country's contemporary conservation regime in 2005, South Africa has had a rigorous regime governing the declaration of CCAs whether by transforming existing protected areas (through the land restitution process) or by creating new protected areas ab initio (under the national conservation).[39] This aspect of the national regime would appear to satisfy all the essential elements identified by international scholars, crucially including extensive provision for public participation.[40] One caveat to this is the prevalence of outdated provincial conservation legislation that is inconsistent with the contemporary national conservation regime.[41] This provincial legislation requires urgent amendment to bring it in line with the national conservation dispensation. A moratorium could be imposed on its use to establish CCAs, particularly in the land restitution context, pending such reform.

[39] See Chapter 9 (Part 6).
[40] See Chapter 3 (Part 4.5).
[41] These laws include: Nature Conservation Ordinance (Cape) (19 of 1974); Nature Conservation Ordinance (Transvaal) (15 of 1974); Nature Conservation Ordinance (OFS) (8 of 1969); Transkei Environmental Conservation Decree (9 of 1992); Nature Conservation Act (Ciskei) (10 of 1987); Protected Areas Act (Bophuthatswana) (24 of 1987); and the Bophuthatswana Nature Conservation Act (3 of 1973).

3.6 INSTITUTIONS

The diversity of institutions and decision-making structures at play in CCAs is very vividly illustrated by the case studies.[42] South Africa's overarching conservation and land reform regimes theoretically provide the necessary flexibility for tailoring the composition of these institutions to suit the specificity of the CCA.[43] They furthermore contain several mechanisms aimed at ensuring that their decision-making takes place in an open, transparent, coordinated and representative manner.[44] However, as is furthermore illustrated by the case studies, the functioning of, and coordination between, these institutions has been less than ideal.[45]

In the context of relevant government institutions, the constitutional dictate of cooperative governance remains a myth[46] and measures should be taken to promote coordination particularly between the conservation, land reform and local government authorities. While the *Memorandum of Understanding* and *National Co-Management Framework* have sought to promote coordination in the run up to the formation of CCAs, this trend unfortunately does not appear to flow through to the post-implementation phase.

The early identification and inclusion of all relevant government authorities in the negotiating process and ensuring that their role is more clearly spelt out in the CCA's founding agreement, will no doubt significantly improve the situation.[47] This will however need to be complemented by initiatives aimed at building the capacity of all relevant government authorities to ensure that they understand the new conservation paradigm and the available legal options for implementing it. Steps will also need to be taken to address the resource constraints facing particularly the land reform authorities and provincial conservation authorities. This should ensure that authorities have the

[42] See Chapter 9 (Part 7).
[43] See Chapter 5 (Part 3.3) and Chapter 6 (Part 5).
[44] See Chapter 9 (Part 7).
[45] Ibid.
[46] See Chapter 9 (Part 7.1).
[47] See Chapter 10 (Part 3.4).

requisite skills and resources to understand and better fulfil their mandates. The satisfaction associated with the latter may in turn slow the rapid turnover of staff in these institutions and minimise associated problems such as inadequate handover procedures and the loss of institutional memory.

Certain of the case studies have also highlighted the value of establishing broad overarching advisory structures, comprising of representatives from all relevant stakeholders, to guide and coordinate the provision of post-settlement support to CCAs.[48] Furthermore, given the key role now played by local government in rural development, including the provision of post-settlement support to CPIs and CCAs,[49] measures need to be taken to the formalise such relationships. As advocated above, local government authorities clearly need to be a party to the negotiations, with their anticipated role in the CCA clearly enunciated in the founding agreement. Some of the case studies have however illustrated the benefits of complementing the above by appointing dedicated representatives within local government to manage this increasing key relationship.[50]

While the above measures will go some way towards improving the functioning of government institutions relevant to CCAs and their relationship with relevant CPIs holding tenure over, or with an interest, in the CCA, it is the functioning of the latter institutions that require the most urgent attention. In the absence of South Africa's communal property regime, communal property associations and trusts have been the chosen legislative vehicles for holding communal land and representing communal interests. The statutory frameworks and founding agreements that regulate their formation and administration specifically seek to ensure that they operate in a representative, accountable, transparent and democratic manner.[51] However, the case

[48] See Chapter 9 (Part 7.1).
[49] Fabricius C, Kock D & Magome H "Towards Strengthening Collaborative Ecosystem Management: Lessons from Environmental Conflict and Political Change in Southern Africa" (2001) 31(4) *Journal of the Royal Society of New Zealand* 842.
[50] Ibid.
[51] See Chapter 6 (Part 3.1 and 5.2).

studies reflect several challenges that preclude the realisation of this ideal.[52] These challenges relate to both the internal functioning of these CPIs and to their dealings with other relevant institutions, particularly traditional authorities.

Recent reports on the internal functioning of existing CPIs are exceptionally damning.[53] The key challenges currently undermining CPIs do not generally appear to be attributable to the comprehensive statutory framework governing their formation and operation. They rather appear attributable to its chequered implementation. Additional resources clearly need to be allocated to government authorities charged with overseeing these CPIs, to ensure that the statutory mechanisms aimed at promoting transparent, democratic and accountable governance are heeded. To promote flexibility and preclude the current trend of long-term despotic governance, provision could be made for the mandatory periodic rotation of the membership of the CPI decision-making structures. Provision could also be made for regular mandatory consultation between these structures and their constituency. To preclude the prevalent fraud and corruption currently associated with many CPIs, provision could also be made for mandatory government oversight of certain types of commercial transactions entered into between the CPIs and third parties (such as concessionaires seeking to undertake commercial activities in CCAs). Finally, although initially tasked with communal land administration, their functions have rapidly broadened into the realm of commerce and rural development. Measures accordingly need to be taken to clarify the core function of these institutions, either by expanding their current statutory mandate, or retaining their current mandate and compelling them to form special purpose vehicles (SPV) when entering into commercial transactions with third parties.

I would advocate the former approach in order to ensure that any benefits stemming from these transactions accrue to the CPIs and not SPVs frequently headed up by the politically well-connected elite within a community. Programmes aimed at building the capacity of CPIs to protect their interests when concluding such transactions would

[52] See Chapter 9 (Part 7.2).
[53] See Chapter 6 (Part 3.1).

clearly need to precede any anticipated expansion of their mandate. It may also be prudent, as proposed above, to provide for compulsory government oversight of such transactions in an effort to ensure that the interests of all CPI members are protected vis-à-vis their leadership and the commercial entity with which they are transacting.

The final issue to be addressed in the context of CPIs is their problematic relationship with traditional leadership structures. As I have argued above, until such time as domestic policy-makers clearly circumscribe the role and functions of these often autocratic traditional leadership structures in South Africa's future communal land tenure regime, destructive battles will continue to wage between them and their contemporary counterparts.[54] The finalisation of this regime is a clear priority. Furthermore, when formulating the nature, composition, powers and functions of its revised communal land tenure institutions, policy-makers should draw valuable lessons from the problems currently undermining the functioning of existing CPIs.

3.7 MANAGEMENT

The first key concern raised by the case studies relating to management, is the wholesale adoption of co-management, and a very narrow and somewhat skewed formulation of it, as the preferred model for bridging the conservation and land reform divide. I have previously canvassed the theoretical and practical problems associated with this approach.[55] I accordingly advocate the move away from the blind reliance placed on the co-management model, as formulated in the *National Co-management Framework*, to one that affords greater recognition to the broad array of governance options prescribed in the relevant domestic legal framework; one which correctly reflects co-management as one option on the continuum of protected areas governance options.[56] New policy frameworks or guidelines will clearly need to be developed to clarify the nature of these diverse governance options and the factors which should inform their selection. Steps are fortunately underway in this regard with the launch of

[54] See Chapter 10 (Part 3.3).
[55] See Chapter 7 (Part 2) and Chapter 9 (Part 8.1).
[56] These governance options are discussed in Chapter 7 (Part 3.2).

the *People and Parks Toolkit*[57] in March 2011, a resource aimed at demystifying these governance options and building capacity amongst authorities and communities to implement them.

All four of the case studies reflect the creation of institutions to regulate the relationship between the local community and the conservation authorities.[58] This trend is supported by the contemporary conservation regime, which prescribes several mechanisms to expressly facilitate this process.[59] The structure and functioning of these institutions are not, however, beyond reproach with decision-making authority frequently remaining vested in hierarchical and centralised conservation authorities.[60] Several measures could be introduced to counteract this unfortunate reality.

Mechanisms could to be prescribed to ensure that the membership of these institutions is far more inclusive and equitably spread between representatives from the relevant CPI and the designated management authority. There may also be merit in extending the membership of these 'co-management' institutions to include representatives from other relevant national and provincial conservation authorities, local government, traditional leadership structures, surrounding communities affected by the CCA, and commercial entities undertaken activities within or adjacent to it. While the role of the latter representatives may need to be delimited to an advisory or observer capacity so as not to unduly congest decision-making, their inclusion feasibly promotes information exchange and cross-institutional collaboration and coordination. Advisory structures of this nature would mimic the park forums,[61] recently established in many national parks in South Africa. However, I propose that these advisory structures, unlike the parks forums, be accorded statutory status, with their membership and advisory functions clearly defined. I would furthermore propose that the functioning of these structures be

[57] Department of Environmental Affairs & Resource Africa *People and Parks Toolkit* (2011).
[58] See Chapter 9 (Part 8.2).
[59] See Chapter 5 (Part 3.1).
[60] See Chapter 9 (Part 8.4).
[61] See Chapter 5 (Part 3.3.3).

initially financed through the Government's *People and Parks Programme*[62] until such time as the relevant CCA becomes financially self-sustainable.

Measures also need to be introduced to preclude the current frequent turnover of particularly community representatives on these institutions.[63] Such measures could include tendering in advance their out-of pocket expenses and opportunity costs occasioned by their participation in these institutions. This could be funded through either the coffers of the relevant CPI or the management authority. Whatever the source, nature and extent of this commitment, it should be very clearly defined in the CCA's founding agreement. So too should the precise nature of the collaborative relationship; mandate of the 'co-management' institution; powers and functions of the institution; respective roles and commitments of its constituent members; decision-making procedures; monitoring and reporting requirements; dispute resolution procedures; and the institution's financial arrangements.

Time and resources could furthermore be allocated to developing and implementing programmes aimed at building the technical and management capabilities of local community representatives. These could improve their role on, and the functioning of, both the 'co-management' institutions and CPIs. Time and resources should perhaps simultaneously be invested in programmes aimed at building the capacity of existing management authorities to understand the virtues of the contemporary conservation paradigm and the vital role played by local communities in its implementation. As the capacity of, and trust between, the constituent members of these 'co-management' institutions improves, provision could then feasibly be made for breaking down these institutions into smaller units and assigning them different functions – thereby seeking to better reflect the nested, overlapping nature of communal resource rights and institutions.[64]

[62] Ibid.
[63] See Chapter 9 (Part 8.2).
[64] See Chapter 3 (Part 4.6).

The functioning of these institutions and the management of CCAs should be informed by a management plan. As reflected in the case studies, the delayed finalisation and on occasion continued absence of a management plan clearly frustrates the prudent management of a CCA, irrespective of its form. It can also lead to tensions and conflicts between communities and conservation authorities. Fortunately, South Africa's contemporary conservation regime compels management authorities to prepare management plans within twelve months of their designation. [65] This should minimise future potential for such delay or absence. It furthermore contains several mechanisms promoting the regular monitoring, review and amendment of the management plan where appropriate.[66] These latter mechanisms should cumulatively ensure that inappropriate management plans do not remain cast in stone.

Management plans generally guide not only the management of the CCA but also the access and use rights that can be exercised within it. Therefore, perhaps it would be wise to ensure that they are negotiated simultaneously with the founding agreements governing the CCA, to avoid 'potential confusion, undue expectation and conflict'.[67] Measures should also be implemented to ensure that such negotiations are inclusive and participatory. Provision could be made for some form of independent oversight, so as to minimise the potential of any inherent power imbalances and capacity differentials to cloud their final content. Furthermore, I would advocate the inclusion of a statutory obligation compelling those undertaking these negotiations to specifically consider and incorporate the often forgotten domain of traditional knowledge and conservation practices into these management plans. As one commentator has argued, the incorporation of traditional knowledge within management plans will lead to 'longer-term sustainable solutions and relations'.[68]

[65] See Chapter 5 (Part 3.1.2).
[66] Ibid.
[67] De Villiers B "People and Parks: Challenges and Opportunities" in *Land Reform in South Africa*: *Constructive Aims and Positive Outcomes - Reflecting on Experiences on the Way to 2014* (2009) Seminar Report No.20, KAS Johannesburg, 88.
[68] Fabricius et al (2001) *Journal of the Royal Society of New Zealand* 842.

3.8 ACCESS, USE AND BENEFIT-SHARING

The central importance of viable and equitable access, use and benefit-sharing schemes to the success of CCAs has been previously noted in this dissertation.[69] The case studies do provide some evidence of stakeholders formulating and implementing schemes of this nature in existing CCAs[70] even in the absence of South Africa's contemporary conservation regime. This regime now theoretically contains a diverse range of mechanisms for implementing access, use and benefit-sharing schemes in CCAs.[71] The challenges relating to the implementation of the former schemes provide valuable guidance for the implementation of the latter statutory framework.

Measures should be implemented to ensure that the negotiation of these schemes comprise an integral part of the general negotiations preceding the conclusion of the CCA's founding agreement.[72] The improved planning process proposed above should inform these negotiations.[73] This would go some way towards ensuring that any such schemes are realistic, viable and properly matched to the management plan for the area. Care should furthermore be taken during these negotiations to dispel misconceptions as to the ability of these schemes to single-handedly sustain rural economies and alleviate deeply entrenched poverty. In this regard, the value of ensuring the participation of local government in the negotiation process to promote better alignment between their rural development programmes and these schemes is gainsaid.

The importance of clearly recording the precise nature of rights and obligations associated with these schemes in the CCA's founding agreement has been canvassed above.[74] So too has the importance of including clear mechanisms for holding defaulting parties to account and including expeditious procedures for resolving disputes which

[69] See Chapter 3 (Part 4.8) and Chapter 9 (Part 9).
[70] See Chapter 9 (Part 9).
[71] See Chapter 5 (Part 3.1).
[72] See Chapter 9 (Part 9.1).
[73] See Chapter 10 (Part 3.2).
[74] See Chapter 10 (Part 3.4).

arise in the implementation of the founding agreements.[75] Provisions of this nature should go some way towards alleviating the disconcerting trend prevalent in many of the case studies of conservation authorities effectively thwarting communities' enjoyment of the full scope of the anticipated access and use rights.[76] The founding agreement should also provide for regular monitoring and reporting on the implementation of the schemes, and enable the parties to review and amend them as changing circumstances so dictate.

Regarding their form, the case studies reflect a very narrow approach particularly regarding feasible eco-tourism opportunities provided by CCAs.[77] There is a clear need to move beyond the current heavy reliance placed on the concession lodge model for all CCAs. Greater emphasis should be placed on promoting and supporting smaller community-based enterprises (such as locally driven cultural and heritage tourism-related enterprises) and the resumption of traditional land-use practices within and adjacent to the CCA, to counteract the often unpredictable nature of the returns associated with eco-tourism ventures.[78] Irrespective of their form, measures need to be taken to support communities in the formulation and implementation of such schemes. Furthermore, where they involve the conclusion of commercial transactions with third parties, measures seeking to promote the openness, transparency, equity and public oversight of these negotiations are again of key relevance.[79] These measures should also aid in overcoming the current challenges relating to ensuring the equitable distribution of benefits stemming from such schemes.[80] While it will ordinarily be claimant communities who benefit through these schemes, certain of the case studies have illustrated the merits of extending their ambit to non-claimant communities residing adjacent to the CCA and traditional leadership structures.[81] Such an approach holds great potential in the South African context for securing broad-based community support

[75] Ibid.
[76] See Chapter 9 (Part 9.3).
[77] See Chapter 9 (Part 9.2).
[78] Ibid.
[79] Such as those proposed in Chapter 10 (Part 3.6).
[80] See Chapter 9 (Part 9.4).
[81] Ibid.

for the CCA and improving the relationship between the relevant CPIs and their traditional counterparts.

3.9 FINANCING AND SUPPORT

Ensuring the financial sustainability of CCAs remains a key challenge in the South African context. The access, use and benefit-sharing schemes discussed above do potentially contribute to sustaining the livelihoods of those dependent on the land and resources situated within the CCA. They can furthermore contribute toward the costs of managing the CCA. However, as is clearly illustrated by the case studies, it is the exception rather than the norm that CCAs will ever be financially self-sufficient and accordingly require ongoing government support and financing.[82]

The Government has in recent times undertaken an array of measures of relevance to supporting and financing the functioning of CCAs.[83] These are to be welcomed but do appear to require refinement and extension. The Government will need to seriously reconsider the decreasing budgetary allocations to the conservation sector.[84] Given the growth in the use of CCAs as a tool for balancing the country's conservation and land reform agenda's and the increasing importance attached to them as vehicles for promoting rural development and poverty alleviation, any such increase appears justifiable from an environmental, social and economic perspective. The Government will also need to rectify the anomalies inherent in many of the existing tax incentives seeking to promote the role of individuals and communities in conservation.[85] Any such reform could include the tailoring of incentives to promote the functioning of CCAs and the CPIs involved in their administration specifically. An additional sphere of potential financing which needs future exploration are the lucrative climate-change incentive schemes, most notably those associated with the Reduced Emissions from

[82] See Chapter 9 (Part 10).
[83] Ibid.
[84] See Chapter 5 (Part 2).
[85] See Chapter 9 (Part 10).

Deforestation and Forest Degradation (REDD) Mechanism and its REDD Plus counterpart.[86]

The provision and sourcing of additional financing to sustain CCAs and CPIs is but one part of the equation. One of the key challenges facing the success of the entire land reform programme, and accordingly similarly CCAs, is the lack of post-settlement support to CPIs.[87] Two institutions with a key role to play in alleviating this challenge are the conservation authorities and local government authorities.

Making clear provision in the founding agreements for skills development and transfer by conservation authorities to CPI members, should aid in building the capacity of the latter to take over the management of CCAs in the long-term. This should be accompanied by clear undertakings by the conservation authority to employ such members subsequently in the CCA's management structures. The inclusion of rigorous mechanisms for holding defaulting parties to account[88] is again of relevance here given the apparent aversion of conservation authorities in several of the case studies to adhere to such undertakings in the past.[89]

A central trend permeating the majority of these recommendations is the vital role of local government authorities in supporting the functioning of both the CCAs and CPIs, given the extension of their mandate to include rural development. Several mechanisms have already been proposed to facilitate the provision of support by local government authorities such as including them in the initial negotiations;[90] co-opting them as parties to the founding agreements;[91] ensuring reciprocal alignment between their planning frameworks and the management plans of CCAs;[92] and including them on relevant advisory forums with a view to facilitating information exchange and alignment between their relevant mandates, functions and programmes and those administered by other

[86] See Chapter 9 (Part 9.2).
[87] See Chapter 9 (Part 10).
[88] See Chapter 10 (Part 3.8).
[89] See Chapter 9 (Part 10).
[90] See Chapter 10 (Part 3.4).
[91] Ibid.
[92] See Chapter 10 (Part 3.2 and Part 3.7).

government departments.[93] These do not need repeating in detail here, save to say that they cumulatively hold potential for ensuring that the CPIs and CCAs receive far better support from local government authorities than is currently the case.

4. THE LAST WORD

South Africa's transition to a constitutional democracy prompted a critical rethink of the skewed ownership of the country's natural commons and entrenched awareness of the inherent importance of ensuring their conservation and sustainable use. The promulgation of the country's land reform regime provided the impetus for addressing the skewed ownership patterns. The promulgation of the country's contemporary conservation regime provided the impetus for recognising the vital role of people in promoting the conservation and sustainable use of the country's natural commons. Comprehensive policy frameworks have been introduced to guide and coordinate the implementation of these two regimes and diverse institutional structures have been mandated to administer them.

Inherent in the above melee of laws, policies and institutional structures are a diverse array of legal tools for promoting CCAs as a key mechanism for balancing the country's land reform and conservation agendas. The use of these legal tools has been somewhat limited to date. This would not generally appear to stem from their flawed formulation as with the exception of the absence of an equitable and viable communal land rights regime, the legal framework generally reflects those elements identified by international commentators as underpinning successful CCA initiatives. Their limited use would rather appear attributable to the hesitancy of domestic policy-makers to acknowledge their full diversity and potential.

This trend is not surprising. As is often noted in the context of the natural commons, 'natural resource governance issues underpin evolving relations between citizen and

[93] See Chapter 10 (Part 3.6).

state'[94] and reforms relating to the natural commons are often not carried out because of the view that 'these resources are too valuable to allow ordinary citizens to own' them.[95] However, South Africa seems to be beyond the point of return. Its international human rights and environmental obligations compel domestic policy-makers to accord due recognition to the land tenure and resource rights of local communities, whilst simultaneously extending the coverage of its protected areas estate. Its constitutional dispensation compels it to simultaneously transform landholding patterns, promote conservation and alleviate poverty. With a little tweaking, its domestic legal framework provides a key solution for achieving this balance; the concept of CCAs. The use of this solution aimed at promoting the equitable and effective regulation of South Africa's natural commons, unfortunately remains in its infancy, but in the words of Murphree, its utility has to date 'not been tried and found wanting; it has been found difficult and rarely tried'.[96] Difficulty should not however preclude its use, as it is often through difficulty that long-term viable solutions to pressing challenges are forged.

[94] Nelson F "Introduction: The Politics of Natural Resource Governance in Africa" in Nelson F (ed) *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa* (2010) Earthscan London 5.
[95] Alden Wily L *Whose Land is it? Commons and Conflict States, Why Ownership of the Commons Matters in Making and Keeping Peace* (2008) Rights and Resources Initiative Washington DC 6.
[96] Murphree M "Community-Based Conservation: Old Ways, New Myths and Enduring Challenges" (2000) Key Address at the Conference on African Wildlife Management in the New Millennium, Mweka Tanzania, December 2000, quoted in Reid H, Fig D, Magome H & Leader-Williams N "Co-Management of Contractual National Parks in South Africa: Lessons from Australia" (2004) 2 *Conservation & Society* 380.

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